

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

No. 14,813
BRIEF FOR APPELLANT

United States Court of Appeals
For the
District of Columbia Circuit
FILED
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IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT
Joseph W. Stewart
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— 672 —
JOE HAYES,

Appellant

v.

FRED A. SEATON, Secretary of the Interior,
Appellee

—
Appeal from an Order of the United States
District Court for the District of Columbia

—
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No. 14,813

**APPELLANT'S STATEMENT OF QUESTIONS
PRESENTED**

Questions presented in the Estate of John Thomas.

1. When a devisee under a will disappears thirteen months prior to the death of the testator, and is presumed to be dead after 7 years' unexplained absence, must a person claiming the estate under the devisee sustain the burden of proving by distinct and affirmative evidence that the devisee survived the testator?
2. When a person claims an estate under an absent devisee and fails to prove by distinct and affirmative evidence that the devisee survived the testator, does the devise lapse and go to the heir-at-law of the testator?

Question presented in the Estate of Joseph Thomas.

When a person disappears and is presumed to be dead after seven years' unexplained absence, will the court presume that the absent person died on or about the date of his disappearance when the established facts and circumstances relating to that person and his disappearance show that the absentee had no cause or reason for disappearing; that he fully intended to return to his residence; that he has not communicated with friends or relatives; that he has not requested lease money due him as he had always done regularly before his disappearance; that diligent search and inquiry has failed to produce any information relative to the absentee's whereabouts since the date of his disappearance?

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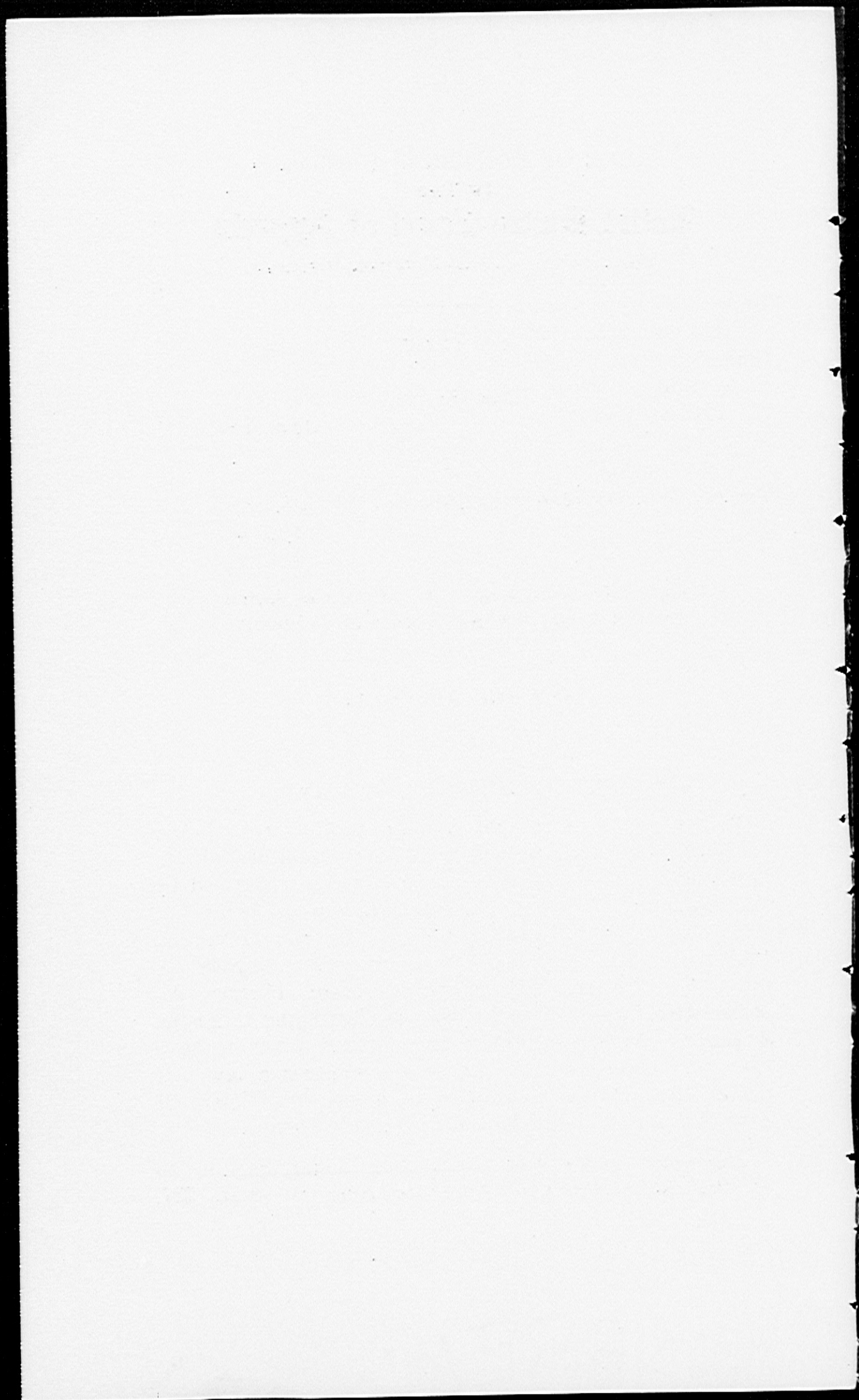
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FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,813

JOE HAYES,

Appellant

v.

FRED A. SEATON, Secretary of the Interior,
Appellee

Appeal from an Order of the United States
District Court for the District of Columbia

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This action was brought by appellant to review and set aside two probate orders of the Examiner of Inheritance of the Department of the Interior, affirmed by the Solicitor of the Department, acting in behalf of Fred A. Seaton, Secretary of the Interior, directing that the Estate of John Thomas, deceased Cayuse Allottee No. 223 and the Estate of Joseph Thomas, deceased Umatilla Allottee No. 877 be distributed to Emma J. Luton. Appellant further brought this action to have the court determine that under the applicable law, appellant, Joe Hayes, is entitled to inherit the Estate of John Thomas and the Estate of Joseph Thomas.

The court below had jurisdiction under Section 10 of the Administrative Procedure Act (60 Stat. 237,

243; 5 U.S.C. sec. 1009) and Title 28, United States Code, sec. 1331 (62 Stat. 930). On separate motions for summary judgment filed by both parties (Joint App. 34A, 35A), a final order was entered, without opinion, granting the motion of appellee, and denying the motion of appellant. Joint App. 63A. Appellant appeals from that order. Joint App. 64A. This court has jurisdiction under 28 U.S.C. secs. 1291, 1294 (62 Stat. 929,930).

STATEMENT OF THE CASE

Sections 1 and 2 of the Act of June 25, 1910, 36 Stat. 855, as amended, 25 U.S.C. secs. 372, 373. authorizes the Secretary of the Interior to determine the heirs of Indians. This authority has been delegated to the Examiner of Inheritance (in effect, the probate officer of the Department of the Interior) with a right of appeal to the Secretary of the Interior. 25 C.F.R., 1958 ed., secs. 15.19, 15.20.

Appellant, Joe Hayes, brought this action to review and set aside two probate orders of the Examiner of Inheritance, affirmed by the Solicitor of the Department of the Interior, ordering that the Estate of John Thomas, and the Estate of Joseph Thomas be distributed to Emma J. Luton. Appellant further brought this action to have the court determine that under applicable law, he is entitled to inherit the Estate of John Thomas and the Estate of Joseph Thomas.

Appellant, Joe Hayes, an Indian residing in Oregon, is the first cousin and heir-at-law of the deceased John Thomas. Emma J. Luton, an Indian residing in Oregon, is the surviving widow of Samuel J. Luton, deceased maternal half brother of Joseph Thomas. Emma J. Luton is the heir-at-law of the deceased Joseph Thomas.

The facts in this case are not in dispute.

The Estate of John Thomas.

John Thomas, a Cayuse Indian, died September 22, 1940, at the age of 52 years, a resident of Oregon, and his estate has been valued at \$63,811.09. He left a will executed October 13, 1923 (Joint App. 24A), in which he devised all his restricted property to his son, Joseph Thomas. But the devisee, Joseph Thomas, disappeared in 1939, 13 months prior to his father's death, and has not been heard from since. Obviously, disposition of the Estate of John Thomas was dependent on whether the devisee, Joseph Thomas was alive or dead. By letter dated May 6, 1954 (Joint App. 37A), the Examiner of Inheritance stated the problem as follows:

With regard " . . . to the estate of John Thomas, deceased Umatilla Allottee No. C-223 . . . final action is dependent upon whether the allottee's son Joseph Thomas, a missing person is living or deceased."

Under date of June 20, 1956, after extensive hearings and exhaustive but unavailing efforts to locate the devisee, Joseph Thomas, the Examiner of Inheritance, made an "Order Approving Will and Determining Heir of Subsequently Deceased Devisee" in the estate of John Thomas (Joint App. 9A-12A). In this Order the Examiner made the following findings and determinations. He presumed that the devisee, Joseph Thomas, died on August 3, 1946 (seven years after date of his disappearance). He presumed that the devisee, Joseph Thomas, survived the testator, John Thomas, and that he took under the devise in his father's will. He determined that at Joseph's death, the property descended to his maternal half brother Samuel J. Luton, and upon the later death of the half brother, the property descended to the half brother's wife, Emma J. Luton.

The Estate of Joseph Thomas.

Under date of June 20, 1956, the Examiner of Inheritance made an "Order of Presumption of Death and

Determining Heirs" in the estate of Joseph Thomas. (Joint App. 26A-28A).

This order, insofar as here material, determined that Joseph Thomas was presumed to have died intestate August 3, 1946 (seven years after his disappearance), at the age of 35 years, and that his estate descended to his maternal half brother, Samuel J. Luton, who died later, leaving as his sole heir his wife, Emma J. Luton. The estate of Joseph Thomas has been valued at \$6,259.53.

By these two orders the Examiner ruled that Emma J. Luton inherited both the Estate of John Thomas and the Estate of Joseph Thomas.

Appellant filed a petition for rehearing of the Examiner's Orders. The Examiner denied the petition (Joint App. 29A-33A), and appellant appealed to the Secretary of the Interior. On November 6, 1957, the Secretary, acting by his Solicitor, affirmed the Examiner and ordered the Estate of John Thomas and the Estate of Joseph Thomas to be distributed to Emma J. Luton (Joint App. 13A-20A). Appellant filed a request for reconsideration. On April 1, 1958, the Secretary, acting by his Solicitor, denied appellant's request.

Having thus exhausted his administrative remedies, appellant on April 3, 1958, brought this action to review and set aside the Examiner's and Secretary's Orders. His contention was, and still is, that under the applicable law he is entitled to inherit the Estate of John Thomas and the Estate of Joseph Thomas (Joint App. 2A-6A).

Appellee filed an answer to Appellant's action (Joint App. 21A-23A). Thereafter both parties filed their respective motions for summary judgment (Joint App. 34A, 35A).

After a hearing, the court below, without a written opinion, denied Appellant's motion for summary judgment, granted the motion of Appellee, and entered a final order to that effect (Joint App. 63A). Appellant appeals from that order (Joint App. 64A).

STATUTES AND REGULATIONS

1. Section 1, Act of June 25, 1910, C. 431, 36 Stat. 855, U.S.C.A., Title 25, sec. 372:

"That when any Indian to whom an allotment of land has been made or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive."

2. Section 2, Act of June 25, 1910, C. 431, 36 Stat. 855, 856, U.S.C.A., Title 25, sec. 373:

"That any Indian of the age of twenty-one years, or over, to whom an allotment of land has been or may hereafter be made, shall have the right, prior to the expiration of the trust period and before the issuance of a fee simple patent to dispose of such allotment by will, in accordance with rules and regulations to be prescribed by the Secretary of the Interior: Provided, however, That no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior . . ."

3. 25 C.F.R., 1958, sec. 15.19 *Appeals*.

"(a) Any person aggrieved by the action taken by the examiner of inheritance . . . may . . . file with the superintendent a written notice of appeal to the Secretary."

4. 25 C.F.R., 1958, sec. 15.20 *Presumptions of death*:

"In accordance with the regulations in this part pertaining to other hearings, an Examiner of Inheritance may hear and determine the issue of whether an Indian, by reason of his unexplained absence, is presumed to be dead."

5. O.R.S. 41.360 (26), Oregon Revised Statutes:

"A person not heard from in seven years is dead."

6. O.R.S. 111.020 (3), Oregon Revised Statutes:

"(3) If the intestate leaves no lineal descendants, surviving spouse or mother, such real property shall descend to his or her father . . ."

7. O.R.S. 111.020 (4), Oregon Revised Statutes:

"(4) If the intestate leaves no descendants, surviving spouse, father, mother, brother or sister, such real property shall descend to his or her next of kin in equal degree . . ."

STATEMENT OF POINTS

The Estate of John Thomas

1. Emma J. Luton's claim to the Estate of John Thomas depends upon the validity of the Examiner's presumption that Joseph Thomas survived John Thomas and that the devise vested.

2. The devise to Joseph Thomas lapsed if he was not in being when John Thomas died.

3. The Examiner of Inheritance erred, as a matter of law, when he presumed that Joseph Thomas survived his father and when he fixed the date of Joseph's death as August 3, 1946 (seven years after his disappearance).

4. The burden of proof rested on Emma J. Luton to show by affirmative evidence that the devisee, Joseph Thomas, survived the testator, John Thomas. Because

of her failure to sustain this burden of proof, the devise to Joseph Thomas lapsed, and the Estate of John Thomas descends to the next of kin of John Thomas instead of Emma J. Luton.

5. The devise to Joseph Thomas having lapsed, the Estate of John Thomas descends to the appellant, Joe Hayes, as the next of kin, and heir-at-law, of the decedent John Thomas.

The Estate of Joseph Thomas

1. Proper application of the prevailing law to the facts and circumstances of record in the Estate of Joseph Thomas require that Joseph Thomas be presumed to have died on or about the date of his disappearance.

2. If Joseph Thomas is presumed to have died on or about the date of his disappearance, the Estate of Joseph Thomas is inherited by the appellant, Joe Hayes, instead of Emma J. Luton.

SUMMARY OF ARGUMENT

At the outset, it should be noted that we are concerned here with two separate estates. The first is the Estate of John Thomas, who left a will. The second is the Estate of Joseph Thomas, who did not leave a will. *The manner in which the Appellee erred in the application of the law to the facts of record can best be demonstrated by considering the Estate of John Thomas and the Estate of Joseph Thomas individually and separately. They are so considered below.*

The Estate of John Thomas.

On September 22, 1940, John Thomas, an Indian residing in Oregon, died, leaving a will in which he devised his "restricted" property to his son Joseph Thomas. But the devisee, Joseph Thomas, disappeared on August

3, 1939, thirteen months prior to the death of the Testator. Almost seventeen years after the date of the disappearance of Joseph Thomas, the Examiner of Inheritance issued an order dated June 20, 1956 (Joint App. 9A-12A) determining the heir of John Thomas. In that order, the Examiner presumed that the devisee, Joseph Thomas, survived his father and fixed the date of Joseph's death as August 3, 1946 (seven years after his disappearance). The Examiner further determined that Joseph Thomas was survived by his maternal half brother, Samuel J. Luton, who subsequently died, leaving as his only heir, his wife, Emma J. Luton. Accordingly, the Examiner determined that Emma J. Luton inherited the Estate of John Thomas.

Emma J. Luton's claim to the Estate of John Thomas depends upon the validity of the Examiner's presumption that the devisee, Joseph Thomas survived the testator John Thomas and that the devise vested. For if Joseph Thomas was not in being when John Thomas died, the devise to him lapsed.

The Examiner of Inheritance erred, as a matter of law, when he presumed that Joseph Thomas survived his father and when he fixed the date of Joseph's death as August 3, 1946 (seven years after his disappearance). For the governing law places the burden of proof on Emma J. Luton (who is claiming under Joseph Thomas) to show by affirmative evidence that the devisee, Joseph Thomas, survived the testator, John Thomas.

Because of her failure to sustain this burden of proof, the devise to Joseph Thomas lapsed, and the Estate of John Thomas descends to the next of kin of John Thomas instead of Emma J. Luton.

The devise to Joseph Thomas having lapsed, the Estate of John Thomas descends to the appellant, Joe Hayes, as the next of kin, and heir-at-law of the decedent, John Thomas.

The Estate of Joseph Thomas.

As we have noted above, Joseph Thomas disappeared on August 3, 1939, thirteen months prior to the death of his father, John Thomas.

The facts and circumstances of record as related and summarized by the Examiner, himself, show that Joseph Thomas had no cause or reason for disappearing; that he was not in trouble or difficulty of any kind; that he fully intended to return to his residence; that he has not communicated with friends or relatives; that he has not requested money due him as he had always done regularly before his disappearance; that diligent search and inquiry has failed to produce any information relative to the absentee's whereabouts.

Notwithstanding these facts and circumstances, the Examiner, by Order dated June 20, 1956 (Joint App. 26A-28A), presumed the date of death of Joseph Thomas to be August 3, 1946 (seven years after his disappearance), and he determined that Emma J. Luton, wife of Joseph Thomas's maternal half brother, Samuel J. Luton, inherited the Estate of Joseph Thomas.

Appellant contends, that the Examiner erred when he presumed that the date of death of Joseph Thomas was August 3, 1946 (seven years after his disappearance). Appellant further contends that a proper application of the prevailing law to the facts and circumstances of record in the Estate of Joseph Thomas require that Joseph Thomas be presumed to have died on or about the date of his disappearance.

If Joseph Thomas is presumed to have died on or about the date of his disappearance, the Estate of Joseph Thomas is inherited by the appellant, Joe Hayes, instead of Emma J. Luton.

ARGUMENT

At the outset, it should be noted that we are concerned here with two separate estates. The first is the Estate of John Thomas, who left a will. The second is the Estate of Joseph Thomas, who did not leave a will. *The manner in which the Appellee erred in the application of the law to the facts of record can best be demonstrated by considering the Estate of John Thomas and the Estate of Joseph Thomas individually and separately.*

The Estate of John Thomas.

On September 22, 1940, John Thomas, an Indian residing in Oregon, died, leaving a will in which he devised his "restricted" property to his son Joseph Thomas. But the devisee, Joseph Thomas, disappeared on August 3, 1939, thirteen months prior to the death of the Testator. Almost seventeen years after the date of the disappearance of Joseph Thomas, the Examiner of Inheritance issued an order dated June 20, 1956 (Joint App. 9A-12A) determining the heir of John Thomas. In that order, the Examiner presumed that the devisee, Joseph Thomas, survived his father and fixed the date of Joseph's death as August 3, 1946 (seven years after his disappearance). The Examiner further determined that Joseph Thomas was survived by his maternal half brother, Samuel J. Luton, who subsequently died, leaving as his only heir, his wife, Emma J. Luton. Accordingly, the Examiner determined that Emma J. Luton inherited the Estate of John Thomas.

1. *Emma J. Luton's claim to the estate of John Thomas depends upon the validity of the Examiner's presumption that Joseph Thomas survived John Thomas and that the devise vested.*

The determination that Emma J. Luton inherited the Estate of John Thomas, is based squarely on the Ex-

aminer's presumption that the devisee, Joseph Thomas survived the testator, John Thomas, and that the devise vested in Joseph Thomas. For Emma Luton who is claiming under the devisee Joseph Thomas cannot legally inherit the Estate of John Thomas unless the devise to Joseph Thomas, under the will of John Thomas, actually vested in Joseph Thomas by virtue of his having survived the testator, John Thomas.

2. The devise to Joseph Thomas lapsed if he was not in being when John Thomas died.

The devise to Joseph Thomas, under John Thomas's will, lapsed if Joseph Thomas was not in being when John Thomas died. For it is settled law that "... a devise or bequest to one who was not in being when the devise or bequest was to vest, was void and without legal effect." 1 Page on Wills (Lifetime ed.) sec. 216, at p. 440.

This principle is further elaborated upon by Mr. Page when he states, "It is said that a lapsed legacy or devise fails since it is 'a principle in law that in all gifts, whether they be by devises or otherwise, there ought to be a donee in esse, who has power and capacity to take the thing given at the time when it ought to vest. For if there be none such in rerum natura, when the thing ought to vest, the gift shall be void'." 4 Page on Wills (Lifetime ed.), sec. 1413 at p. 161. The same principle is cogently stated in 69 Corpus Juris, section 2267 as follows: "A legacy or devise lapses where at the time of the death of the testator, or the time when the legacy or devise would vest, there is no one in existence."

Therefore, if Joseph Thomas did not survive his father, John Thomas, the devise to him lapsed, and Emma J. Luton, who is claiming under Joseph Thomas, could not inherit the Estate of John Thomas.

In view of the foregoing the critical question to be answered in the case of the Estate of John Thomas is

whether Joseph Thomas survived his father John Thomas.

As we have noted, the Examiner of Inheritance answered this question in the affirmative by *presuming* that Joseph Thomas survived his father John Thomas and by fixing the date of Joseph Thomas's death as August 3, 1946 (seven years after the date of his disappearance.)

3. *The Examiner of Inheritance erred, as a matter of law, when he presumed that Joseph Thomas survived his father and when he fixed the date of Joseph's death as August 3, 1946 (seven years after his disappearance).*

The Examiner of Inheritance erred, as a matter of law, when he *presumed* that Joseph Thomas survived his father and when he fixed the date of Joseph's death as August 3, 1946 (seven years after his disappearance).

For the settled law is that when death after seven years unexplained absence has been presumed, the continuance of life during that period, and the date of death will not be presumed.

This rule is expressed in the case of *Davie v. Briggs*, 97 U.S. 628 (1878), and in the cases and authorities cited therein.

In the case of *Davie v. Briggs*, the Supreme Court said:

"Mr. Taylor, in the first volume of his Treatise on the Law of Evidence (sect. 157) say, that 'although a person who has not been heard of for seven years is presumed to be dead, the law raises no presumption as to the time of his death; and, therefore, if any one has to establish the precise period during those seven years at which such person died, he must do so by evidence, and can neither rely, on the one hand, on the presumption of death, *nor on the other, upon the presumption of the continuance of*

life.' These views are in harmony with the settled law of the English courts. In *re Phene's Trust*, Law Rep. 5 Ch. 139; *Hopewell v. De Pinna*, 2 Camp. N.P. 113; *Reg. v. Lumley*, Law Rep. 1 C. C. 196; *Re Lewes's Trusts*, Law Rep. 11 Eq. 236; 32 Law J. Ch. 104; 40 id. 507; 29 id. 286; 37 id. 265. In the leading case in the Court of Exchequer of *Nepean v. Doe dem. Knight* (2 Mee. & W. 894), in error from the Court of King's Bench, Lord Denman, C. J., said: 'We adopt the doctrine of the Court of King's Bench, that the presumption of law relates only to the fact of death, and that the time of death, whenever it is material, must be a subject of distinct proof.' To the same effect are *Mr. Greenleaf and the preponderance of authority in this country.*" (Emphasis supplied).

This view has been similarly expressed by the Supreme Court of Oregon in the case of *Hefford v. Metropolitan Life Insurance Co.*, 173 Ore. 353; 144 P. 2d 695, 702 (1944) as follows:

"The weight of authority, both in this country and in England, is that the presumption from seven years' absence is of death alone and not of the time of death. The presumption of death arises at the end of seven years, but by this it is not meant that death is presumed to have occurred at that time, but on some day within the seven year period. According to the leading English case of *Nepian v. Knight*, 2 M. & W. 894, the probabilities are that death took place a considerable time before the expiration of the seven year period. In that case Lord Denman, C. J. said at p. 913 of the report, 'Now, when nothing is heard of a person for seven years, it is obviously a matter of complete uncertainty at what point of time in those seven years he died; of all the points of time, the last day is the most improbable, and most inconsistent with the ground of presuming the fact of death. That presumption arises from the great lapse of time since the party has been heard of; because it is considered extraordinary, if he was alive, that he should not be heard of. In other words, it is presumed that his not being heard of

has been occasioned by death, which presumption arises from the considerable time that has elapsed. If you assume that he was alive on the last day but one of the seven years, then there is nothing extraordinary in his not having been heard of on the last day; and the previous extraordinary lapse of time, during which he was not heard of, has become immaterial by reason of the assumption that he was living so lately. The presumption of the fact of death seems, therefore, to lead to the conclusion that the death took place some considerable time before the expiration of the seven years.'” (Emphasis supplied)

The Examiner of Inheritance properly presumed Joseph Thomas to be dead after seven years unexplained absence. But, when the Examiner presumed that Joseph Thomas survived his father and when he fixed the date of Joseph's death as August 3, 1946 (seven years after his disappearance), he erred as a matter of law, and he acted in a manner which is clearly incompatible with and contrary to the “weight of authority, both in this country and in England” as expressed by the Supreme Court in *Davie v. Briggs*, supra, and as expressed by the Supreme Court of Oregon in the *Hefford* case, supra.

4. ***The burden of proof rested on Emma J. Luton to show by affirmative evidence that the devisee, Joseph Thomas, survived the testator, John Thomas. Because of her failure to sustain this burden of proof, the devise to Joseph Thomas lapsed, and the Estate of John Thomas descends to the next of kin of John Thomas instead of Emma J. Luton.***

It must be remembered that in claiming the Estate of John Thomas, Emma J. Luton is claiming under the devisee, Joseph Thomas. Emma J. Luton inherits the Estate of John Thomas only if the devise to Joseph Thomas actually vested in him by virtue of his having survived John Thomas. For the prevailing law is that the burden of proof rests on Emma J. Luton to show

by affirmative evidence that the devisee, Joseph Thomas, survived the testator, John Thomas. If Emma J. Luton failed to prove that Joseph Thomas survived John Thomas, the devise to Joseph lapses, and the Estate of John Thomas descends to the next of kin of John Thomas instead of Emma J. Luton.

In *Davie v. Briggs*, supra, the Supreme Court of the United States cited certain English cases and text book writers as authorities in respect to the question under consideration. Among the cases and authors cited were *In Re Phene's Trusts*, *In Re Lewes's Trusts*, and *Greenleaf* and *Taylor* in their treatises on the law of evidence. Because of the importance attached by the Supreme Court to the views of these authorities, we will review the opinions of these cases and the passages from these authors at some length below.

The case of *In Re Phene's Trusts*, Law Rep. 5 Ch. 139, cited in *Davie v. Briggs*, supra, is *identical in its essential facts with the facts of this case*. In the *Phene* case, as in this one, a devisee disappeared prior to the date of the death of the testator, who devised a share in his estate to the absentee, and the heirs of the absent person are claiming the devise. Lord Justice Giffard, speaking for the court, stated the facts of the case and the governing law as follows:

"This is an appeal from so much of an order of Vice-Chancellor James as directs the residue of a fund which is standing to 'The account of the share intended for Nicholas Phene Mill,' to be paid to his administrator." (at p. 143)

"The order was made upon the hypothesis that Nicholas Phene Mill survived Francis Phene, the testator." (at p. 144).

"The true proposition is, that those who found a right upon a person having survived a particular period must establish that fact affirmatively by evidence; the evidence will necessarily differ in dif-

ferent cases, but sufficient evidence there must be, or the person asserting title will fail." (at p. 152)

In conclusion Lord Justice Giffard stated:

"It is enough, however, for me to state that in my opinion the burden of proof is on the representative of Nicholas Phene Mill, and that Nicholas Phene Mill's representative has not proved affirmatively that Nicholas Phene Mill survived the testator—a proof which I consider essential to his title." (at p. 154).

To paraphrase the conclusion of Lord Justice Giffard, and apply it to the instant case—"The burden of proof" is on the representative (Emma J. Luton) of Joseph Thomas, and Joseph Thomas's representative "has not proved affirmatively that Joseph Thomas survived the testator—a proof which I consider essential to . . . title."

Perhaps one of the clearest expositions of the law governing the question at issue is contained in the case of *In Re Aldersley*, Law Rep. 2 Ch. 184, 185. In that case Judge Kekewich stated:

"Questions relating to the presumption of death frequently arise for decision in chambers in the administration of estates, and especially small estates. The question has to be determined whether somebody is dead, and if so, when he died; and, although the Court is bound to direct inquiries, in many cases the inquiries are productive of very little result . . .

"The case to which one always refers on this subject is *In re Phene's Trusts* (5), and to that case I will now content myself with referring. The judgment in that case is very exhaustive and very instructive. The point there was shortly this. The testator died on January 5, 1861, having made a bequest in favor of nephews and nieces living at the testator's death. He had a nephew who had gone abroad in 1853, and was last heard of on June 16, 1860, i.e., within seven months of the testator's death. The question was whether he was entitled to share in the testator's

bounty. The law would presume that, whatever was proved or concluded, he was dead at the expiration of seven years from June 16, 1860; but that presumption gave no assistance in solving the question whether he was alive on the day of the testator's death, namely, January 5, 1861, and Giffard L. J., differing from James V. C., came to the conclusion, not that he was dead on January 5, 1861, but that those who claimed his share as nephew must prove that he was alive, that the burden was upon them, and that as they had not established that fact the property was divisible amongs the nephews and nieces who were proved to have survived the testator . . . 'the true proposition is, that those who found a right upon a person having survived a particular period must establish that fact affirmatively by evidence; the evidence will necessarily differ in different cases, but sufficient evidence there must be, or the person asserting title will fail.'" (Emphasis supplied).

Applying the above to the instant case we would arrive at the following:

"'the true proposition is, that those (Emma J. Luton) who found a right upon a person (Joseph Thomas) having survived a particular period (John Thomas's death) must establish that fact affirmatively by evidence; the evidence will necessarily differ in different cases, but sufficient evidence there must be, or the person (Emma J. Luton) asserting title will fail.'"

The same view is expressed in 1 *Greenleaf Evidence* (13th ed., 1876) sec. 41, footnote 2 at pages. 50, 51:

"The presumption in such cases is, that the person is dead; but not that he died at the end of seven years, nor at any other particular time. *Doe v. Nepean* 5 B. & Ad. 86; 2 M.W. 894. Death is presumed from the person not being heard from for seven years, and whoever has to make out the case of death at any particular time must prove it by affirmative evidence; and those who claim under a person who is said to have survived a particular

period must prove the fact. *Lewes Trusts*, L.R. 11 Eq. 236; s.c. affirmed, L. R. 6 Ch. 356." (Emphasis supplied).

In the case of *In Re Lewes's Trusts*, Law Rep. 11 Eq. 326, the court, in reaching its decision, discussed the opinion of L. J. Giffard in the *Phene* case in the following statement:

"He (L. J. Giffard) comes, therefore, to the conclusion that, although Nicholas Phene Mill had been heard of as nearly as possible within the same period from the death of the testator as this legatee has been heard of, as there was no proof that he survived the testator, he or those claiming under him did not take a share in the fund. Now that case is precisely the case before me, and I am bound by that decision."

The same principle is expressed in 1 *Taylor Evidence*, (11th ed., 1920), sec. 200:

"But although a person, who has not been heard of for seven years, is presumed to be dead, the law raises no presumption as to the time of his death, and therefore, if any one has to establish the precise period during those seven years, at which such person died, he must do so by evidence, and can neither rely, on the one hand, upon the presumption of death, nor on the other, upon the presumption of the continuance of life (i). So, also, the burden of proving that the person was alive at any particular period within the seven years is upon the person asserting it (k)." (Emphasis supplied)

In footnote "K" Mr. Taylor cites the case of *Re Benjamin*, (1902) 1 Ch. 723; 71 L.G. Ch. 819.

In the case of *Re Benjamin*, 1 Ch. 723; 71 L.G. Ch. 819, the headnote contains the following statement of the holding in the case:

"Where the presumption of law that a person who had not been heard of for seven years is dead applies, the burden of proving that he was alive at a particular time within that period, so as to be en-

titled as a legatee to a share of a testator's estate on surviving that testator, lies upon those claiming under him, and must be discharged by distinct and affirmative evidence."

And in his opinion in the case of *Re Benjamin*, J. Joyce said:

"I believe that Philip David Benjamin is dead. And I think that he must be presumed to be dead on the evidence in this particular case. There is no reason why he should hesitate to come home now, although there might have been some hesitation at first. Therefore, I think he must be presumed to be dead. . . . The question is as to when he died. If he is to be presumed to be dead, I think the case of Walker, in re, distinctly applies, and the *onus of proof is on his representative*. *He has failed to bring any evidence to show that this gentleman survived the testator*. I think he died within a very short time after September 1, 1892. It is probable he died then, or at all events shortly afterwards. I am clearly of opinion that the *onus is on those claiming under him to prove he survived*. (Emphasis supplied).

Under the prevailing law, therefore, Emma J. Luton, who is claiming under Joseph Thomas, had the burden of proving by affirmative evidence that the devisee, Joseph Thomas survived the testator, John Thomas. Since Emma J. Luton failed to sustain this burden of proof,¹ the devise to Joseph Thomas lapsed, and the Estate of John Thomas descends to the next of kin of John Thomas instead of Emma J. Luton.

¹ "No evidence was presented to show that Joseph Thomas survived his father." (Page 11 of appellee's "Memorandum of points and authorities in support of defendant's motion for judgment on the pleadings or for summary judgment" submitted in the court below.

period must prove the fact. Lewes Trusts, L.R. 11 Eq. 236; s.c. affirmed, L. R. 6 Ch. 356." (Emphasis supplied).

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The same principle is expressed in 1 *Taylor Evidence*, (11th ed., 1920), sec. 200:

"But although a person, who has not been heard of for seven years, is presumed to be dead, the law raises no presumption as to the time of his death, and therefore, if any one has to establish the precise period during those seven years, at which such person died, he must do so by evidence, and can neither rely, on the one hand, upon the presumption of death, nor on the other, upon the presumption of the continuance of life (i). So, also, the burden of proving that the person was alive at any particular period within the seven years is upon the person asserting it (k)." (Emphasis supplied)

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titled as a legatee to a share of a testator's estate on surviving that testator, lies upon those claiming under him, and must be discharged by distinct and affirmative evidence."

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Under the prevailing law, therefore, Emma J. Luton, who is claiming under Joseph Thomas, had the burden of proving by affirmative evidence that the devisee, Joseph Thomas survived the testator, John Thomas. Since Emma J. Luton failed to sustain this burden of proof,¹ the devise to Joseph Thomas lapsed, and the Estate of John Thomas descends to the next of kin of John Thomas instead of Emma J. Luton.

¹ "No evidence was presented to show that Joseph Thomas survived his father." (Page 11 of appellee's "Memorandum of points and authorities in support of defendant's motion for judgment on the pleadings or for summary judgment" submitted in the court below.

5. *The devise to Joseph Thomas having lapsed, the Estate of John Thomas descends to the appellant, Joe Hayes, as next of kin, and heir-at-law, of the decedent John Thomas.*

Since Emma J. Luton failed to prove that Joseph Thomas survived John Thomas, the devise to Joseph Thomas lapsed. In these circumstances, the Estate of John Thomas would pass as in the event of intestacy. Therefore, the Estate of John Thomas would descend to John's next of kin in accordance with subsection O.R.S. 111.020(4) of the Oregon Revised Statutes, which provides in pertinent part as follows:

"(4) If the intestate leaves no descendants, surviving spouse, father, mother, brother, or sister, such real property shall descend to his or next of kin in equal degree."

Under this provision of the Oregon Revised Statutes, the Estate of John Thomas would descend to appellant Joe Hayes, as next of kin, and heir-at-law, of the decedent John Thomas.¹

CONCLUSION WITH RESPECT TO THE ESTATE OF JOHN THOMAS

Emma J. Luton's claim to the Estate of John Thomas depended upon the validity of the Examiner's *presumption* that Joseph Thomas survived John Thomas and that the devise vested. For the devise to Joseph Thomas lapsed if he was not in being when John Thomas died. The Examiner of Inheritance erred, as a matter of law, when he *presumed* that Joseph Thomas survived his

¹ "... if Joseph predeceased his father, then his estate would have been inherited by the father and both estates would descend to the plaintiff (Joe Hayes) as heir-at-law of John Thomas, the father." (Statement of appellee's attorney in the court below, appearing at pages 3 and 4 of the transcript of the hearing.)

father and when he fixed the date of Joseph's death as August 3, 1946 (seven years after his disappearance). For the burden of proof rested on Emma J. Luton to show by affirmative evidence that the devisee, Joseph Thomas, survived the testator, John Thomas. Because of her failure to sustain this burden of proof, the devise to Joseph Thomas lapsed, and the Estate of John Thomas descends to the next of kin of John Thomas instead of Emma J. Luton. The devise to Joseph Thomas having lapsed, the Estate of John Thomas descends to the appellant, Joe Hayes, as the next of kin, and heir-at-law, of the decedent John Thomas.

The Estate of Joseph Thomas.

Let us consider next the matter of the Estate of Joseph Thomas.

Under date of June 20, 1956, the Examiner of Inheritance made and "Order of Presumption of Death and Determining Heirs" in the Estate of Joseph Thomas (Joint App. 26A-28A).

In this order, the Examiner *presumed* that Joseph Thomas survived his father John Thomas; he determined that Joseph died intestate and fixed the date of Joseph's death as August 3, 1946 (seven years from the date of his disappearance). The Examiner determined that the Estate of Joseph Thomas descended to his maternal half brother, Samuel J. Luton, and after Samuel Luton's death, the estate descended to Emma J. Luton, wife and sole heir of Samuel Luton.

1. *Facts and circumstances relating to Joseph Thomas's disappearance—Testimony of Tony Benson.*

The facts and circumstances relating to Joseph Thomas's disappearance were related to the Examiner by Tony Benson in his statement of January 31, 1951 (Joint App. 42A-45A).

Tony Benson's testimony is quoted below in its entirety:

Statement of Tony Benson, taken under oath, at his home, Route 1, White Swan, Washington, January 31, 1951.

Q. State your name, age, tribe and place of residence.

A. Tony Benson. Age 34. Yakima Tribe. White Swan, Wash., Rural Rte. 1.

Q. Were you acquainted, at one time, with a man named Joe Thomas, from the Umatilla Indian Reservation, who is said to have disappeared while in Portland, Oregon, a number of years ago?

A. Yes. I knew him quite well.

Q. For how long a time, and how well were you acquainted with him?

A. I knew him for about ten years before he disappeared. We ran around together and were both working in a camp at Warm Springs when he disappeared.

Q. How old were you when you first knew him?

A. About 17 or 18—probably less than that, because it's been 9-10 years or more since he disappeared.

Q. Tell me all that you know about his disappearance.

A. We went in to Portland together. It was in the spring. Around the end of May I believe. We were both working in this E. C. camp at Warm Springs. I had a car. We decided to go into Portland for the week end. There were two other fellows rode in with us. I don't remember their names. We got into town and in a parking lot down town. Joe was wearing one of my shirts. He intended to go and get a shirt and I told him I would meet him between 4th and 5th on Alder because we were going to get a room up in that part of town. From then on I never did see him. I left the car there until Sunday evening and in fact until about one

o'clock Monday morning. I was looking for him around town there. Never found him.

Q. Did you make any inquiry at the police station, or elsewhere in Portland at that time?

A. Yes. We inquired at the Police station. They had no information regarding him.

Q. Did anyone else in town from the Warm Springs Reservation who knew Joe Thomas, know of his disappearance that time?

A. Yes. Eugene Stevens, from Montana, was in town at the same time, and he had a car and drove back to Warm Springs at the same time.

Q. Do you know whether any bodies have been recovered from the river in Portland which may have been identified as Joe Thomas?

A. No, but just two or three years ago I heard a body had been recovered about the time Joe disappeared, but that it was dressed differently from the way Joe was dressed at the time he left me. He was wearing white cordury trousers and a black shirt at the time.

Q. Was Joe in any trouble with the law or with anyone else at the time?

A. Not that I knew of.

Q. Did he have a wife or children?

A. He used to talk about a wife that he had that died. She was supposed to have been from Idaho, I believe. He would talk about her when he would get about half lit up. She is supposed to have died before this happened.

Q. Do you mean by "lit up" that he became intoxicated occasionally?

A. Yes.

Q. Did he ever mention any children?

A. No, not that I know of.

Q. Was there any reason for him to disappear that you know of?

- A. No.
- Q. Do you believe he is dead?
- A. Well, I don't know. I wouldn't believe he was dead until I saw that he was dead or knew of him recently dead.
- Q. Can you tell me your impressions of him so far as his mental attitude was concerned. Did he appear to be satisfied with his work? Did he get along with the fellows he worked with?
- A. Well, I think he seemed to be satisfied with his work all right, but he was sort of punch drunk. He had boxed quite a lot, and every time he would do any drinking he would want to pick a fight or a quarrel with someone.
- Q. Was he drunk or sober at the time he left you in Portland that last time you saw him.
- A. Sober then, but I sometimes wondered if he might have stopped in somewhere and had a few drinks and maybe got in a fight with someone.
- Q. Is there any further statement that you care to make in connection with this matter, that you think might be of some assistance in closing the case, one way or another?
- A. I don't know. They have been looking for him for a long time. If he was alive he would naturally write for the money that's been piling up at the Agency. If he was alive, he would naturally want money, and he would know where to get it.
- Q. Have you ever heard of any body having seen him since the time you mentioned?
- A. No.
- Q. And you, yourself have not seen him since then?
- A. No.
- Q. How old a man was he at the time?
- A. He was up in his late 20's or possibly in his 30's.

Certified, a correct transcript of my notes of the testimony of Tony Benson, given under oath before me at his home, near White Swan, Washington, Jan. 31, 1951.

/s/ A. H. BRUCE
Examiner of Inheritance.

2. Diligent search and inquiry have failed to produce any information relative to Joseph Thomas's whereabouts since his disappearance.

The record discloses that diligent search and inquiry have failed to produce any information relative to Joseph Thomas's whereabouts since his disappearance. The extent and comprehensive nature of this search and inquiry is evident from the following:

1. The search and inquiry started when Tony Benson reported Joseph Thomas's disappearance to the police in Portland, Oregon on the weekend of Joseph's disappearance. See Tony Benson's statement, *supra*.
2. The Superintendent of the reservation sent out circulars to all the Indian Reservations. (See testimony of Samuel J. Luton, Joint App. 49-51A, at 51A)
3. "In October, 1940, about 100 copies of a missing notice containing a picture and description of Joseph Thomas were circularized among the police departments and law enforcement agencies, including penitentiaries, in the Northwest. No clue has been received as to his whereabouts . . ." (Joint App. 46A, 47A, letter dated December 15, 1952, from the Commissioner of Indian Affairs to Senator Wayne Morse.)
4. On June 28, 1954, in response to an inquiry of the Commissioner of Indian Affairs, the Director of the Federal Bureau of Investigations reported that that agency had no information concerning Joseph Thomas's whereabouts since his disappearance (Joint App. 48A)

3. *The facts and circumstances relating to Joseph Thomas's disappearance prompted the Examiner of Inheritance to recommend to the Department that Joseph Thomas be presumed to have died on or about the date of his disappearance.*

The facts and circumstances relating to Joseph Thomas's disappearance prompted the Examiner of Inheritance to recommend to the Department of the Interior that Joseph Thomas be presumed to have died on or about the date of his disappearance. The Examiner's report and recommendation, in this connection, are contained in this letter to the Commissioner of Indian Affairs, dated May 6, 1954 (Joint App. 37A-41A), portions of which are quoted below:

"The circumstances, so far as they are known, are concisely summarized in the record before the office, but for convenience they will be stated briefly again. Joseph Thomas was employed at a C.C.C. camp on the Warm Springs Reservation, Oregon, in the fall of 1939. He went to Portland for a visit, in company with several other young men similarly employed, apparently intending to return to his work. He became separated from his companions shortly after arriving in Portland and has not since been seen, nor has any communication been received from him.

"The statement of Tony Benson, who was well acquainted with the absentee's habits and disposition, furnishes ground for speculating that Joseph Thomas may have met with foul play as the result of his inclination to quarrel and fight when stimulated by drink.

"It does not appear that the absentee had any cause or reason for disappearing. He was not in trouble or difficulty of any kind. Although of a wandering nature, it appears he fully intended to return with his companions to the CCC camp at Warm Springs. He has not communicated with the Agency requesting lease money as he had always done regularly before his disappearance. Diligent search and in-

quiry has failed to produce any information relative to the absentee's whereabouts.

"Joseph Thomas has been absent for more than thirteen years. The facts are overwhelmingly such as to raise a legal presumption of death under the Oregon statute. It is recommended that the matter be placed before the office of the Secretary for an appropriate order, based upon such presumption.

"If the Department will proceed upon a presumption that Joseph Thomas died single and without issue at or about the time of his disappearance, on a date in the fall of 1939, then it would appear that at the time of the death of the Testator, John Thomas, in September, 1940, he was a single man, without issue surviving, and the attempted devise of the residue of his property to his son, Joseph Thomas, lapses, and the estate passes as in the event of intestacy. What I believe should be done, therefore, is to proceed with the determination of the heirs of John Thomas without regard to the alleged will, and it is so recommended. It seems needless to give further consideration to the document since it is of no effect on the trust estate." (Emphasis in all paragraphs supplied)

Notwithstanding his prior recommendation that Joseph Thomas be presumed to have died on or about the date of his disappearance, the Examiner, by his order dated June 20, 1956 (Joint App. 26A-28A), presumed that the date of Joseph Thomas's death was August 3, 1946 (seven years after his disappearance).

What accounts for this variance? Some light may be shed on this question by the fact that prior to October 22, 1954, the Examiner of Inheritance could only hold hearings and make recommendations when Indian estates involved presumptions of death due to unexplained absence. However, on October 22, 1954 (Joint App. 62A), the Examiner's authority was enlarged, and he was authorized to "hear and determine the issue of

whether an Indian, by reason of his unexplained absence, is presumed to be dead."¹

Faced with the responsibility of making such a determination for the first time, the Examiner of Inheritance misconstrued the law governing the question of when an absent person may be presumed to be dead on or about the date of his disappearance. This is apparent upon analysis of the Examiner's order denying appellant's petition for rehearing (Joint App. 29A-33A). Let us here examine some of the Examiner's statements contained therein:

"In cases before the Interior Department where there was no peril to the party disappearing shown or where no catastrophe in which the party may have died, it has consistently been held that the party is presumed to have died at the expiration of 7 years unexplained absence.

"In view of the foregoing and from the record established in this matter, it is believed that the disappearance was the cause of death, and under Oregon Statute, Joseph Thomas could not have been declared legally dead before the expiration of 7 years unexplained absence, and therefore, no error was committed in presuming him to have died in 1946."

From the foregoing statement, it appears that the Examiner of Inheritance believed that in order to be able to presume the death of Joseph Thomas prior to August 3, 1946, it was necessary that proof be submitted showing that Joseph Thomas was exposed to some catastrophe or imminent peril at the time of his disappearance. In the absence of this proof, the Examiner believed that "under Oregon Statute, Joseph Thomas could not have

¹ Section 15.20 of 25 C.F.R., 1958 ed., reads:

"Presumption of death. In accordance with the regulations in this part pertaining to other hearings, an Examiner of Inheritance may hear and determine the issue of whether an Indian, by reason of his unexplained absence, is presumed to be dead . . ."

been declared legally dead before the expiration of 7 years unexplained absence, and therefore, no error was committed in presuming him to have died in 1946."

This view has been specifically rejected by the Supreme Court of Oregon. Thus in *Hefford v. Met. Life Ins. Co.* (1944) 173 Ore. 353; 144 P. 2d 695, the Supreme Court of Oregon stated:

"Exposure to imminent peril in a disappearance case is not an indispensable requisite of proof that a person who has been absent without tidings for more than 7 years died at or about the time of his disappearance.

"The death of an absent person before the expiration of seven years may be presumed or inferred from circumstances other than exposure to a probably fatal danger, where such circumstances show an improbability of, or lack of motive for, a mere abandonment of his home.

"It is seldom possible in controversies which reach the courts to determine truth with absolute certainty. Of necessity we resort to the rule of probabilities. And so, in a disappearance case, the majority of the courts adhere to the view, to which this court is committed, that the circumstances connected with the unexplained long-continued absence of a person from his home may be such as to justify the belief that it is improbable that he basely deserted his family and surrendered all the things which normal men count of value in life, and probable that, had he not died at or about the time of his disappearance, he would have been heard from."

This view was restated again by the Supreme Court of Oregon in the case of *Pearson v. Coulter*, 186 Ore. 570; 208 P. 2d, 349, 354, when it said:

"In this state the common law disputable presumption that a person not heard from in seven years is dead has been enacted into statute. It is generally held however, that when one who is last seen in a state of imminent peril, that might pre-

sumably result in his death, is never again heard from, although diligent search for him is made, an inference of immediate death may justly be drawn. . . . *This court, in common with many others, has gone further and held that even though the missing person may not have been exposed to imminent peril, the circumstances may be such as to justify a finding of death at or about the time of his disappearance.*" (Emphasis supplied).

Along the same lines, we find this statement in 22 American and English Encyc. of Law, 2d Ed. (1902), at p. 1249:

"In a number of cases it has been held that where other circumstances than the mere absence of seven years are shown, such as the failure of the absentee to apply for the income of his property upon which he was dependent for his support or that he suddenly ceased his usual communications with his family or that he had been exposed to specific perils, a presumption that his death occurred within the seven years is justified." (Emphasis supplied).

The statement immediately preceding, is of particular significance in view of the statement of the Examiner (Joint App. 38A) that:

"He (Joseph Thomas) has not communicated with the Agency requesting lease money as he had always done regularly before his disappearance."

In the same connection we find Tony Benson (Joint App. 44A) stating:

"If he was alive he would naturally write for the money that's been piling up at the Agency. If he was alive, he would naturally want money, and he would know where to get it."

The significance of these statements is underlined by the fact that Joseph Thomas, at the time of his disappearance was stationed at a C.C.C. camp. If memory serves well, we will recall that enrollees in the C.C.C. camps received only \$30.00 a month.

4. *Proper application of the prevailing law to the facts and circumstances of record in the Estate of Joseph Thomas require that Joseph Thomas be presumed to have died on or about the date of his disappearance.*

As a factual matter, the Examiner of Inheritance found that the facts and circumstances relating to the disappearance of Joseph Thomas show that Joseph Thomas had no cause or reason for disappearing; that he was not in trouble or difficulty of any kind; that he fully intended to return to his residence; that he has not communicated with friends or relatives; that he has not requested money due him as he had always done regularly before his disappearance; that diligent search and inquiry has failed to produce any information relative to the absentee's whereabouts.

As we have seen, the search for Joseph Thomas started immediately after his disappearance when Tony Benson notified the local police in Portland, Oregon. The search continued when the Superintendent of the Reservation sent circulars to all the Indian Agencies, and when "In October, 1940, about 100 copies of a missing notice containing a picture and description of Joseph Thomas were circularized among the police departments and law enforcement agencies, including penitentiaries in the Northwest." As late as June 28, 1954, the Federal Bureau of Investigation advised the Commissioner of Indian Affairs that it had no information concerning Joseph Thomas's whereabouts since his disappearance.

In view of these facts which have been assembled and reported by the appellee, the only conclusion that can reasonably be reached is that Joseph Thomas died on or about the date of his disappearance.

Moreover, a proper application of the prevailing law requires such a determination. For the foregoing circumstances and facts regarding Joseph Thomas's life

and disappearance "show an improbability of, or lack of motive for, a mere abandonment of his home." . . . They justify the belief that it is improbable that he basely deserted his family and surrendered all the things which normal men count of value in life, and probable that, had he not died at or about the time of his disappearance, he would have been heard from." (See the opinion of the Supreme Court of Oregon in the *Hefford* case, *supra*) These circumstances, are "such as to justify a finding of death at or about the time of his disappearance." *Pearson v. Coulter*, 186 Ore. 570; 208 P. 2d, 349, 354.

For the foregoing reasons appellant believes that Joseph Thomas should be presumed to have died on or about the date of his disappearance.

5. *If Joseph Thomas is presumed to have died on or about the date of his disappearance, the Estate of Joseph Thomas is inherited by appellant, Joe Hayes, instead of Emma J. Lutton.*

If Joseph Thomas is presumed to have died on or about August 3, 1939, the date of his disappearance, then he predeceased his father, John Thomas, who died on September 22, 1940. It would follow therefore, that John Thomas would have inherited the Estate of Joseph Thomas, who died intestate, under subsection O.R.S. 111.020(3) of the Oregon Revised Statutes.¹ It would follow, further, that the Estate of John Thomas (which would then include the Estate of Joseph Thomas) would be in-

¹ Subsection O.R.S. 111.020(3) of the Oregon Revised Statutes, provides, in pertinent part:

"(3) If the intestate leaves no lineal descendents, surviving spouse or mother, such real property shall descend to his or her father; . . ."

herited by Joe Hayes, as first cousin of John Thomas, under 111.020(4) of the Oregon Revised Statutes.²

The appellee has also determined that if Joseph Thomas is presumed to have died on or about the date of his disappearance, the Estate of Joseph Thomas would be inherited by the appellant, Joe Hayes.³

CONCLUSION

In view of the failure of Emma J. Luton to show by affirmative evidence that the devisee, Joseph Thomas, survived the testator, John Thomas, the devise to Joseph Thomas lapsed, and the Estate of John Thomas is in-

² Subsection O.R.S. 111.020(4) of the Oregon Revised Statutes, provides in pertinent part:

"(4) If the intestate leaves no descendants, surviving spouse, father, mother, brother, or sister, such real property shall descend to his or her next of kin in equal degree . . ."

³ "If the Department will proceed upon a presumption that Joseph Thomas died single and without issue as or about the time of his disappearance, on a date in the fall of 1939, then it would appear that at the time of the death of the Testator, John Thomas, in September 1940, he was a single man, without issue surviving, and the attempted devise of the residue of his property to his son, Joseph Thomas, lapses, and the estate passes as in the event of intestacy." (Joint App. 40 A, Examiner's letter of May 6, 1954.)

"Petitioner contends that Joseph Thomas, having disappeared in 1939, should have been declared legally dead in 1939 instead of 7 years later, in 1946 . . .

"If the contention of the petitioner is correct, then the estate of Joseph Thomas would vest in his father, John Thomas, and upon the death of John Thomas, his estate would vest in the legal representative or representatives of John Thomas, who appears to be the petitioner, Joe Hayes. (Joint App. 30 A, Examiner's order denying petition for rehearing.)

" . . . if Joseph predeceased his father, then his estate would have been inherited by the father and both estates would descend to the plaintiff (Joe Hayes) as heir-at-law of John Thomas, the father. (Pages 3 and 4 of Statement of appellee's attorney at the hearing in the Court below.)

herited by the appellant Joe Hayes, heir-at-law and next of kin of John Thomas.

In view of the facts and circumstances in the matter of the Estate of Joseph Thomas, the prevailing law requires a presumption that Joseph Thomas died on or about the date of his disappearance. Therefore, appellant, Joe Hayes, inherits the Estate of Joseph Thomas, instead of Emma J. Luton.

The appellee erred, as a matter of law, when he presumed that Joseph Thomas survived his father and when he fixed the date of Joseph's death as August 3, 1946 (seven years after his disappearance). Accordingly, the appellee further erred in ruling that Emma J. Luton inherited both the Estate of John Thomas and the Estate of Joseph Thomas.

The court below erred in sustaining the appellee's rulings. The judgment below should therefore be reversed with directions to grant appellant the relief prayed for in his complaint (Joint App. 2A-6A).

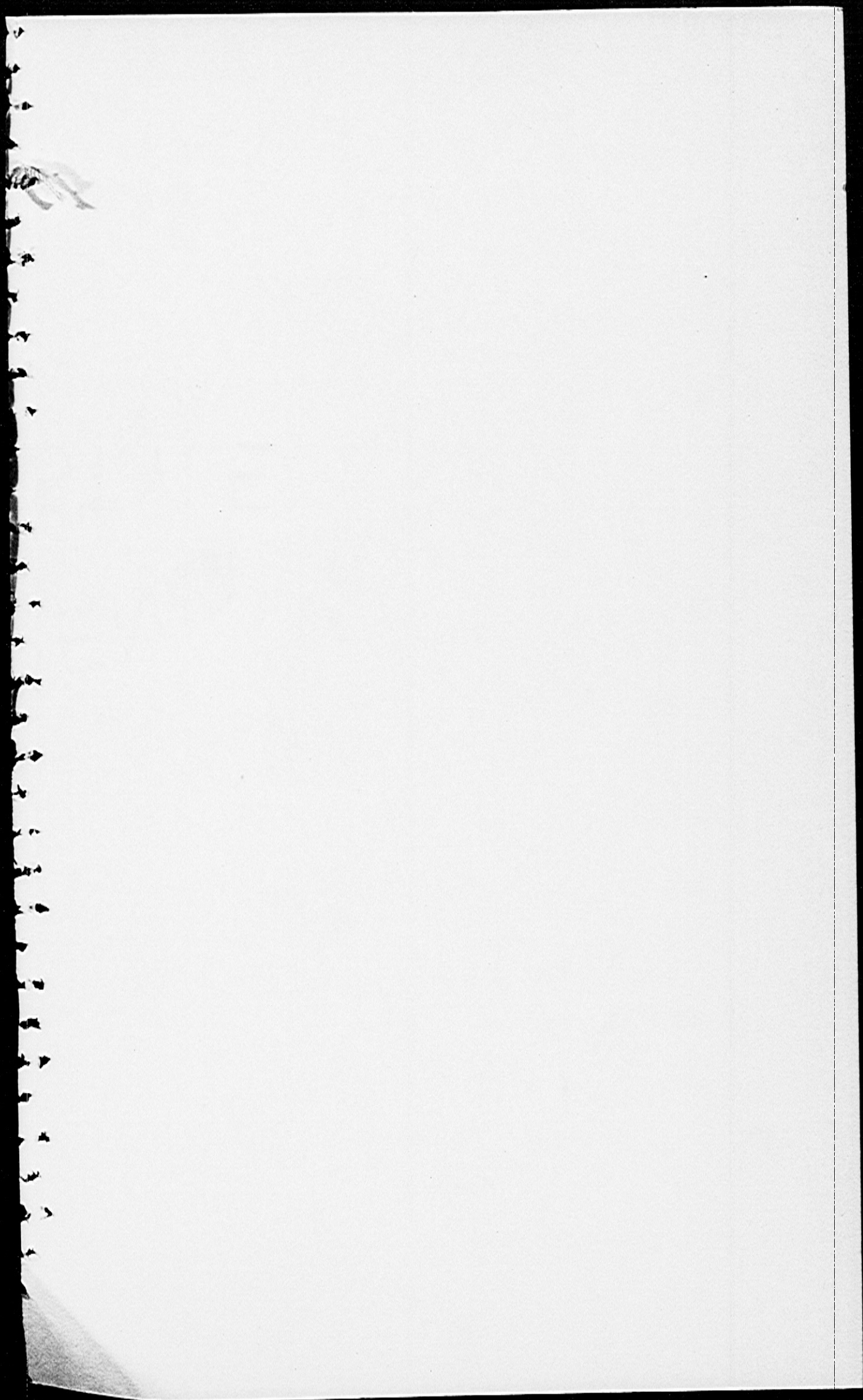
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January 2, 1959



**BRIEF FOR FRED A. SEATON, SECRETARY OF
THE INTERIOR, APPELLEE**

**In the United States Court of Appeals
For the District of Columbia Circuit**

No. 14813

JOE HAYES, *Appellant*

v.

FRED A. SEATON, SECRETARY OF THE INTERIOR, *Appellee*

**Appeal from a Judgment of the United States District Court
for the District of Columbia**

United States Court of Appeals
For the
District of Columbia Circuit

FILED JAN 29 1959

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QUESTIONS PRESENTED

1. Whether Section 1 of the Act of 1910, as amended, 36 Stat. 855, 25 U.S.C. 372, providing that the determination by the Secretary of the Interior of the heirs of Indians dying intestate in possession of restricted property is "final and conclusive," permits a court to overturn that determination on the basis of a different view of application of laws of presumption and burden of proof.

2. Whether the Secretary of the Interior had any reasonable basis for determining that a son was living at the time of his father's death, 13 months after the son's disappearance, and was dead after 17 years' absence without tidings.

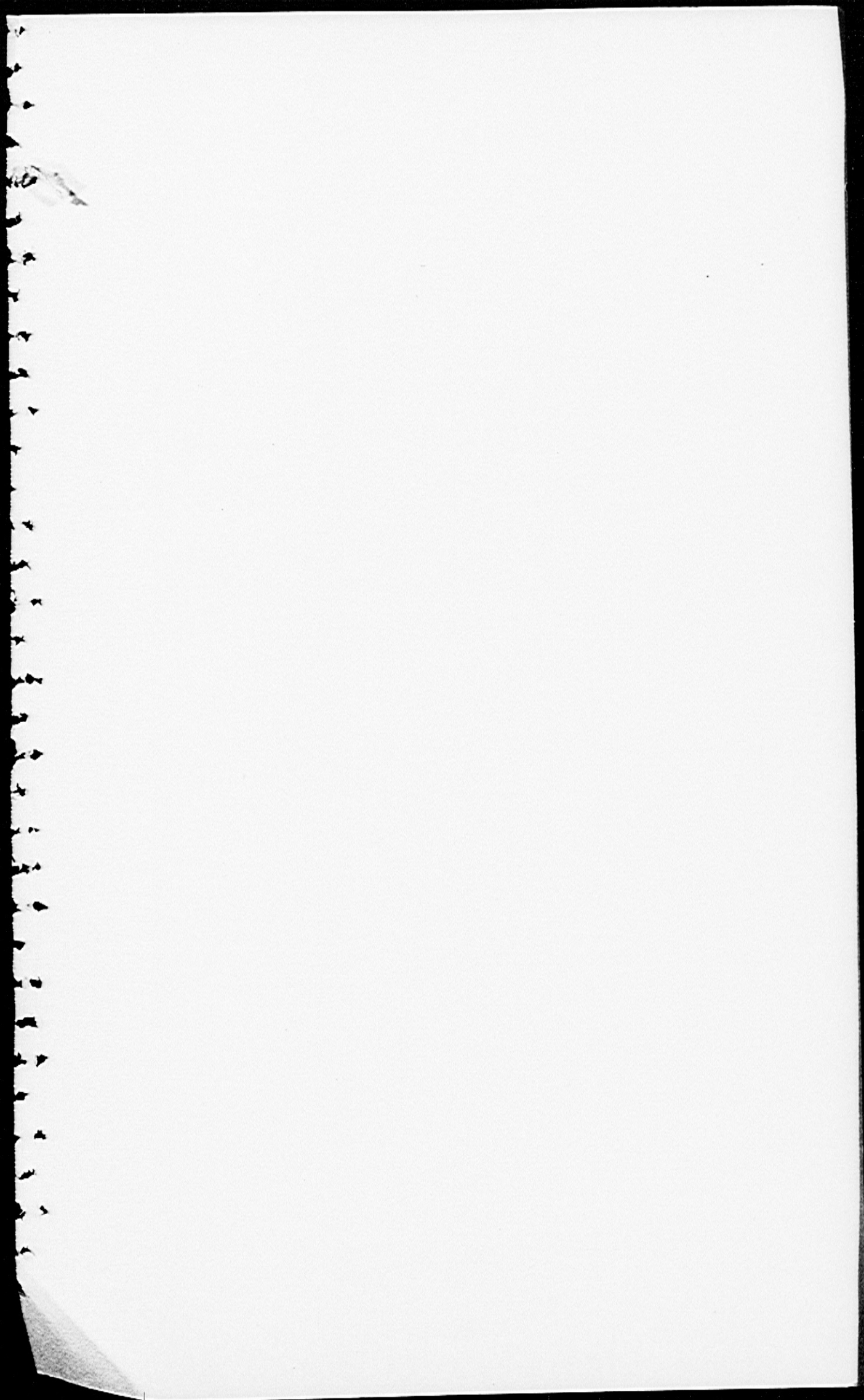
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MISCELLANEOUS:

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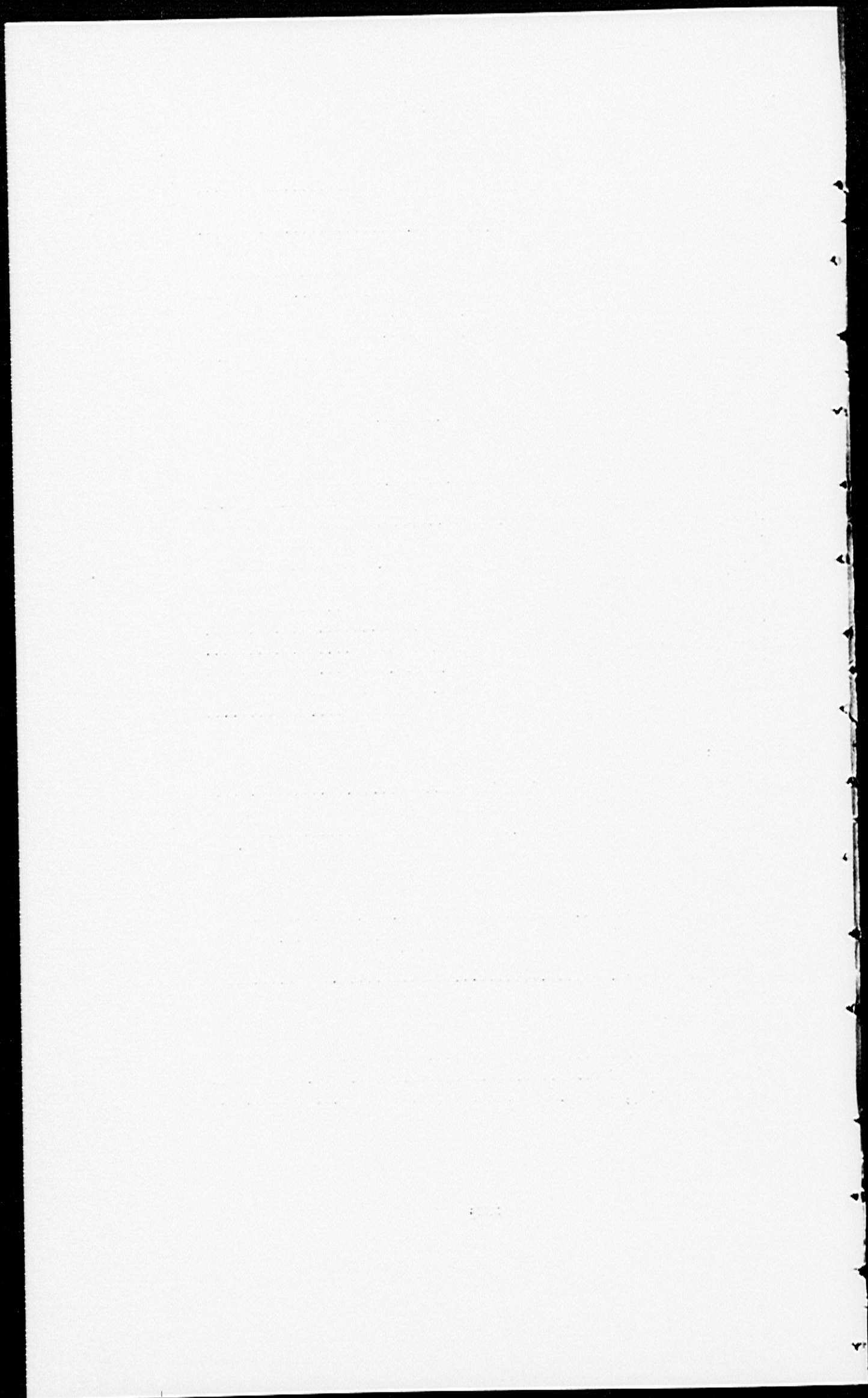
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**BRIEF FOR FRED A. SEATON, SECRETARY OF
THE INTERIOR, APPELLEE**

OPINION BELOW

The District Court did not write an opinion. The order dismissing the complaint is printed at p. 63A of the Joint Appendix.

JURISDICTION

Suit was filed by appellant in the district court seeking review of an administrative determination by the Secretary of the Interior as to heirship of certain restricted Indians. Jurisdiction of the district court was asserted to be under 5 U.S.C. sec. 1009, the Administrative Procedure Act (Jt. App. 2A). The complaint was dismissed pursuant to an order entered September 17, 1958, granting a motion for summary judgment by the Secretary made on grounds

challenging the jurisdiction of the court, as well as presenting argument on the merits. A notice of appeal was filed October 17, 1958. (Jt. App. 64A.) Jurisdiction of this Court is asserted to be under 28 U.S.C. sec. 1291.

STATUTES AND REGULATIONS INVOLVED

Act of February 8, 1887, 24 Stat. 389, as amended, 25 U.S.C. sec. 348, reads in part as follows:

* * * *Provided*, That the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided: * * *

Section 1 of the Act of June 25, 1910, 36 Stat. 855, as amended, 25 U.S.C. sec. 372, provides in part as follows:

When any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive. * * *

Section 2 of the Act of June 25, 1910, 36 Stat. 855, as amended, 25 U.S.C. 373, provides in part as follows:

Any persons of the age of twenty-one years having any right, title, or interest in any allotment held under trust or other patent containing restrictions on alienation or individual Indian moneys or other property held in trust by the United States shall have the right prior to the expiration of the trust or restrictive period, and before the issuance of a fee simple patent or removal of restrictions, to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior: *Provided, however*, That no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior: * * *

25 C.F.R. pt. 15.1:

Administration of estates. The heirs of Indians who die intestate possessed of trust or restricted property shall be determined by examiners of inheritance except as otherwise provided in the regulations in this part. The wills of deceased Indians disposing of trust or restricted property shall be approved or disapproved by examiners of inheritance except as otherwise provided in the regulations in this part. Claims against the estates of Indians shall be allowed or disallowed by examiners of inheritance in accordance with the regulations in this part.

25 C.F.R. pt. 15.15:

Decision. The examiner of Inheritance shall, except as provided in § 15.21, decide the issues of fact and law involved in the proceeding and shall incorporate his findings and conclusions in a decision. Every decision determining the heirs of an Indian who died intestate shall cite the law of descent and distribution in accordance with which the decision was made. Every decision approving the will of an Indian shall state the devisees and legatees who take under the will and the particular property which each is to receive, and shall construe any ambiguous provision of the will. Every decision shall state those claims against the estate which are allowed and those claims which are disallowed. A copy of the decision shall be mailed to each person who is found by the Examiner to be entitled to share in the estate, to each person whose claim to share in the estate was considered and denied by the Examiner, and to the Superintendent.

25 C.F.R. pt. 15.20:

Presumption of death. In accordance with the regulations in this part pertaining to other hearings, an Examiner of Inheritance may hear and determine the issue of whether an Indian, by reason of his unexplained absence, is to be presumed dead. If he concludes that the Indian is to be presumed dead, the Examiner shall proceed as in cases where the fact of death is established without such a presumption.

Oregon Revised Statute: 41:360 Disputable Presumptions:

* * *

(26) A person not heard from in seven years is dead.

* * *

(32) A thing once proved to exist continues as long as is usual with things of that nature.

* * *

STATEMENT OF THE CASE

This suit was instituted by appellant in the court below seeking to review and set aside an administrative determination of the Secretary of the Interior, for declaratory judgment, and for injunctive relief. The complaint was filed April 3, 1958, and alleged that the Secretary's determination of the heirs of certain restricted Indians was "erroneous, illegal and without authority in law." (Jt. App. 2A-6A.) The Secretary of the Interior answered (Jt. App. 21A-23A) by admitting many of appellant's allegations of fact, but challenged the jurisdiction of the court over the subject matter and denied that his determination was erroneous.

This action has reference to the probate of the estate of two deceased Indian allottees, and involves Indian property restricted against alienation without approval of the Secretary of the Interior.¹ By Sections 1 and 2 of the Act of June 25, 1910, 36 Stat. 855, as amended, 25 U.S.C. secs. 372, 373, Congress authorized the Secretary of the Interior to approve wills and determine the heirs of Indian allottees dying testate and intestate, insofar as their restricted property is concerned. Pursuant thereto, the Secretary has promulgated regulations to aid in carrying out the purposes of the statute, 25 C.F.R. pt. 15.

Accordingly, on June 20, 1956, the Examiner of Inheritance, pursuant to the authority delegated to him by the Secretary, 25 C.F.R. pt. 15.1, made an Order of Presump-

¹ The Cayuse and Umatilla Indians were authorized to take allotments on the Umatilla Reservation by the Acts of March 3, 1885, 23 Stat. 340, and March 2, 1917, 39 Stat. 969, 987.

tion of Death and Determining Heirs in the estate of Joseph Thomas (Jt. App. 26A-28A). On the same date the Examiner also made an Order Approving Will and Determining Heir of Subsequently Deceased Devisee in the Estate of John Thomas, father of Joseph (Jt. App. 9A-12A). These two orders may be briefly summarized as follows: From the evidence presented at the hearings conducted in the matter of the estate of Joseph Thomas, the Examiner found that he had disappeared from Portland, Oregon, on August 3, 1949; that diligent search had been made to no avail; that Joseph had

little regard for his relatives and had no local attachments of any kind and was in the habit of leaving home for considerable periods of time without notifying anyone of his whereabouts. Further, there is no evidence of any catastrophe involved in which Joseph Thomas may have perished at the time of his disappearance.

The date of death was determined by the Examiner to have been seven years after his disappearance. It was further found that Joseph died intestate. His sole heir-at-law, determined in accordance with Oregon laws of descent and distribution, was Emma J. Luton, wife and sole heir of his subsequently deceased half-brother on the maternal side. The Order also stated that the estate of Joseph's father, John Thomas, was concluded simultaneously with the instant case. Joseph's estate, consisting of restricted property, was appraised in the amount of \$6,259.53.

In the Order entered in the matter of the estate of John Thomas, the Examiner stated that hearings had been held for the purpose of determining the validity of an instrument purporting to be the last will and testament of John Thomas and ascertaining his heirs; that simultaneously thereto, the estate of Joseph Thomas had also been considered, but that the matter of determining the heirs of the father was held in abeyance pending the settlement of the estate of the son, Joseph. Reference was then made to the decree entered in the estate of Joseph Thomas determining the date of his death to be in 1946, that is, six years after the father's death. The Examiner found that John died

testate in 1940, a resident of Oregon; that the will was valid; that by the terms of said will his entire estate of restricted property descended to his son, Joseph; that Joseph was in existence at the time of his father's death; that Emma J. Luton is the sole surviving heir-at-law of the subsequently deceased Joseph; and accordingly it was concluded that the entire estate of restricted property of John Thomas, appraised at \$63,811.09, should vest in Emma J. Luton as the representative of the subsequently deceased Joseph Thomas.

On August 22, 1956, the Examiner of Inheritance denied a petition for rehearing filed by appellant herein (Jt. App. 29A-33A). In his order denying rehearing, the Examiner of Inheritance stated appellant's contention to be that the son, Joseph, should have been declared to have died at the time of his disappearance instead of seven years later. If this contention were correct, the Examiner goes on to state, then the estate of the son would vest in the father; and at the father's death, the will devising his estate to his predeceased son would lapse and the father's estate would then vest in the father's legal representative, "who appears to be the petitioner, Joe Hayes."² This same position is now taken by appellant.

From the denial of rehearing appellant appealed to the Secretary of the Interior. On November 6, 1957, the Acting Solicitor, acting under a delegation of authority by the Secretary, affirmed the determination of the Examiner (Jt. App. 14A-20A). Appellant then filed a request for reconsideration. On April 1, 1958, the Deputy Solicitor denied this request after again reviewing the merits of appellant's case.

Appellant then filed the instant action in the lower court requesting that the Secretary's decisions be set aside and that he be adjudged the sole heir-at-law of John Thomas. Appellant's complaint was dismissed on motion of the Secretary for summary judgment (Jt. App. 34A). This appeal followed.

² Joe Hayes is a cousin of the father, John Thomas. (Jt. App. 10A.)

SUMMARY OF ARGUMENT

I

Section 1 of the Act of 1910 explicitly states that the Secretary's determination of the heirs of an Indian dying intestate "shall be final and conclusive." This section has been consistently interpreted by the courts as vesting the exclusive administrative control of the subject matter in the Secretary, thereby precluding overturn of his rulings for errors of law or otherwise. Restrictions on the property involved herein have not been lifted. The sole ground upon which the determination is challenged is for error of law. It directly follows that the determination in the instant cases under Section 1 of the Act cannot be overturned on the ground presented herein.

Section 10 of the Administrative Procedure Act, 5 U.S.C. sec. 1009, erroneously relied upon by appellant, does not afford jurisdiction. Administrative actions under statutes precluding judicial review are specifically excepted from review under the Act by Section 10 thereof. The Secretary's determination, being final and conclusive under Section 1 of the 1910 Act, clearly falls within the exception. Moreover, the Administrative Procedure Act does not vest new jurisdiction in the federal courts nor enlarge the jurisdiction of suits against the United States or its officers. The only review of land matters is by a proceeding in the nature of mandamus to correct unauthorized or arbitrary and capricious acts. It is not alleged that such acts have been taken here. It is clear that there is at least a reasonable basis for the Secretary's decisions.

The determination which appellant seeks reviewed is one of fact. An administrative finding of fact will not be disturbed without allegation that such fact was not supported by the evidence. Therefore, where there is neither such an allegation, nor grounds presented therefor, the court may not disturb a finding of fact.

Jurisdiction of the court to review the Secretary's determination under Section 2 of the Act of 1910 relating to Indians dying testate may be broader than such review

under Section 1. However, the determination in the instant case under Section 2 rested primarily on the determination made pursuant to Section 1. The same complaint is raised in each instance. The finding under Section 1 is conclusive by statute and cannot be attacked indirectly. Accordingly, to avoid the result of contradictory findings, the determination under Section 2 in the father's estate, must be regarded as equally conclusive.

II

On the merits, the finding by the Examiner of Inheritance that the son was living at the time of his father's death is a reasonable inference of fact and is supported by the evidence. Therefore, this finding is not erroneous on the ground contended by appellant, that the Examiner misapplied the law of presumptions. The use of the presumption of the continuance of life to show the son survived his father is not erroneous. The cases precluding the use of this presumption are not controlling. The Secretary is not required to follow state law, except for the laws of descent and distribution. Therefore, it was not error to apply the rule espoused in the federal courts permitting use of the presumption.

The determination by the Examiner that the son was dead at the time the order determining heirs was issued is supportable as both a legitimate inference of fact, as well as being a correct presumption of law based on seven years unexplained absence.

ARGUMENT

I

The Determination of the Heirs of Joseph Thomas by the Secretary of the Interior Is Final and Conclusive and Is Not Subject to be Overturned by the Courts.

A. *The words "final and conclusive" in Section 1 of the Act of 1910, supra, preclude judicial review of the Secretary's determination of heirship of an Indian dying intestate:—*In Section 1 of the 1910 Act, *supra*, Congress de-

clared that the Secretary's determination of the heirs of an Indian dying intestate "shall be final and conclusive." The exclusive jurisdiction and authority of the Secretary to determine an intestate's heirs was plainly established in the early cases following the 1910 Act: *Egan v. McDonald*, 246 U.S. 227 (1918); *Parr v. Colfax*, 197 Fed. 302 (C.A. 9, 1912); *Bond v. United States*, 181 Fed. 613 (D.C. Ore. 1910); *Pel-Ata-Yakot v. United States*, 188 Fed. 387 (D.C. Okla., 1911). The necessity that the Secretary should have this exclusive jurisdiction arose primarily from the general supervisory power and control essential to cause the allotted lands to inure during the trust period to "the sole use and benefit of the allottees." Thus, in denying the court's jurisdiction to review the Secretary's act under the 1910 statute, the Supreme Court stated that " * * * the rights of the Indians can be better preserved by the quasi-paternal supervision of the general head of the Indian affairs." *Hallowell v. Commons*, 239 U.S. 506 (1916). See also *United States v. Bowling*, 256 U.S. 484 (1921); *Chase v. United States*, 272 Fed. 684 (C.A. 8, 1921). Dispositive of appellant's contentions is *First Moon v. White Tail*, 270 U.S. 243 (1926), where, citing *Hallowell v. Commons*, *supra*, and *United States v. Bowling*, *supra*, the Court held that the question of review "must be regarded as settled," even as to errors of law, stating, "The court below held, correctly we think, that it was without jurisdiction, since the matter had been entrusted to the exclusive cognizance of the Secretary of the Interior by the Act * * * of 1910. * * * The legislative history of the Act of 1910—Cong. Rec. Vol. 45, p. 5811—lends support to this construction; and abundant reason for the provision becomes apparent upon consideration of the infinite difficulties which would otherwise arise in connection with the sundry duties of the Secretary of the Interior relative to Indian allotments." Thus, this Court has held that while the property is within the Secretary's control, his decision under Section 1 of the 1910 Act was beyond judicial review, for " * * * it is too elementary to require citation of authority that this revisory power [of the courts] cannot be invoked through extraordinary

process." *Red Hawk v. Wilbur*, 59 App. D.C. 248, 39 F. 2d 293 (C.A. D.C. 1930).

Accordingly, when this question last arose in 1952 in the case of *Arenas v. United States*, 197 F. 2d 418, the Ninth Circuit could speak with ample authority on the subject of review under Section 1. The contention was raised in that case that although the act makes the determination by the Secretary final and conclusive, "such action may be set aside in this action when shown to be *contrary to law* or to have been unsupported by any evidence." (Emphasis added.) After citing the Supreme Court decisions, *supra*, the court explicitly denied that contention, holding that "while the Secretary's administrative duties continue, the words 'final and conclusive' in this act 'must be treated as absolutely excluding the right to review in the courts' " even as to matters involving errors of law.

Language taken out of context was relied upon by appellant in the court below to establish a broad power of review for "errors of law" contrary to the above-cited cases. The language apparently first appears in *Dixon v. Cox*, 268 Fed. 285 (C.A. 8, 1920), appeal dismissed 258 U.S. 634; and is repeated in later cases. *Bowling v. United States*, 299 Fed. 438 (C.A. 8, 1924); *Hanson v. Hoffman*, 113 F. 2d 780 (C.A. 10, 1940); *Peoria Tribe or Band of Indians v. Wea Townsite Co.*, 117 F. 2d 940 (C.A. 10, 1941). But none of these cases overruled the Departmental determination or even discussed arguments comparable to that which appellant is attempting to have the courts decide. The legal questions they discussed were matters going to jurisdiction of the Secretary such as constitutionality of the statute (*Dixon*) or the adequacy of service of process (*Bowling* and *Peoria Tribe*). As the *Hanson* case makes clear the courts were there exercising the general equity jurisdiction to compel a defendant who by fraud or other means has obtained property which does not rightfully belong to him to hold it in constructive trust for the owner. That jurisdiction does not permit direct review of the Secretary's decision as here attempted contrary to the 1910 Act.

B. *The Administrative Procedure Act, Sec. 10, 5 U.S.C. sec. 1009, does not support the jurisdiction of the court below:*—Section 10 of the Administrative Procedure Act, 5 U.S.C. sec. 1009, provides for judicial review of administrative decisions. Appellant relies upon this section in the jurisdictional statement, contending that pursuant thereto the district court had jurisdiction to review the decisions of the Secretary here involved. However, it is submitted that reliance upon that Act for jurisdiction is plainly in error. Section 10 of the Act provides for judicial review as follows: "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion."

Section 1 of the Act of 1910 *supra*, under which authority the Secretary acted, clearly states that his decision "shall be final and conclusive." In view not only of the clear wording of the statute, but also of the cases interpreting this language, *supra*, it seems difficult, indeed, if not impossible, to reconcile these two statutes in order to draw from them the conclusion that the court has jurisdiction to review the decision of the Secretary.

Moreover, as this Court has held in *Kansas City Power & Light Co. v. McKay*, 96 App. D.C. 273, 282, 225 F. 2d 924, 933 (1954) cert. den. 350 U.S. 884, the Administrative Procedure Act "does not render competent a court which lacks jurisdiction on any other ground". The jurisdiction of the district court over the Secretary of the Interior rests solely upon its mandamus power. The mandamus remedy is limited in the main, as the Supreme Court recently put it in *Panama Canal Co. v. Grace Line, Inc.*, 356 U.S. 309, 318 (1958), to "situations where ministerial duties of a non-discretionary nature are involved." Appellant has made no attempt to show that the decision is so plainly wrong and unreasonable that mandamus would lie. At the very least there is sufficient basis for the Departmental decision that it cannot properly be denominated arbitrary.

Moreover, while appellant calls the alleged error of the Department "error of law" (e.g., Br. 7, 10), the very statement of the questions presented shows that actually there

is here presented simply a factual issue, "Was the son living at the time of the father's death?". Even under statutory review, there is very limited authority to re-examine facts found by administrative tribunals, *e.g.*, *Universal Camera Corp. v. Labor Bd.*, 340 U.S. 475 (1951), and "it is well settled that the decision of the Land Department upon questions of fact is conclusive in the courts". *De Cambra v. Rogers*, 189 U.S. 119, 122 (1903).

C. *Appellant's attack upon the rulings as to the estate of John Thomas falls when jurisdiction to entertain his attack upon the rulings in regard to the estate of Joseph Thomas fails:*—The jurisdiction to review rulings when an Indian has left a will under Section 2 of the 1910 Act is somewhat broader than the jurisdiction relating to intestate estate proceedings under Section 1. *Homovich v. Chapman*, 89 App. D.C. 150, 191 F.2d 761 (1951). However, here no independent attack is made upon the validity of the will or any rulings about its provisions. The Departmental ruling is challenged solely upon the same complaint as is made in the intestate proceedings, *i.e.*, that the Department erred in finding that Joseph, the son, outlived John the father. But that question was primarily to be determined and was determined in the estate of Joseph. Since that finding was, by statute, conclusive it may not, we submit, be indirectly attacked by challenging the ruling when applied to the estate of the father. Otherwise, the absurd result of contradictory findings of the same fact might be made as to the two estates. Certainly Congress could have intended no such result.

II

The Determination by the Secretary of the Interior Is Not Clearly Wrong.

1. *The finding by the Examiner of Inheritance that the son survived his father is supported by the evidence:*—The basic issue throughout the proceedings before the Secretary was the question of succession as between the father, John, and the son, Joseph. This question was one of fact

depending on whether the son had survived the father. Since this single issue was a question of fact, the Examiner of Inheritance, acting pursuant to Section 1 of the Act of 1910, *supra*, and 25 C.F.R. pt. 15 of the regulations, found that the son did not die at the time of his disappearance on the basis of the following findings (Jt. App. 26A-27A):

* * * The records show that the party [Joseph] had little regard for his relatives and had no local attachments of any kind and was in the habit of leaving home for considerable periods of time without notifying anyone of his whereabouts. Further, there is no evidence of any catastrophe involved in which Joseph Thomas may have perished at the time of his disappearance.

Clearly, from the facts that Joseph Thomas was living prior to his disappearance and that he was of a wandering and irresponsible nature, the reasonable and prudent man could draw the inference, based on common experience and natural reason, that the son continued to live for at least the next 13 months. Appellant has neither attacked the adequacy of the findings nor challenged the findings as being unsubstantiated by the evidence. Thus, in this case we have a legitimate inference of fact adequately supported by the evidence: life in existence prior to the disappearance and uncontroverted facts as to the wandering nature of the son. The inference of fact that the son's life continued at least until his father's death 13 months later is thereby firmly established beyond dispute at this time.

Appellant contends that the burden of proving the son did not survive the father was erroneously placed upon his shoulders. This error arose, is the contention, through a misapplication of the presumption of continuance of life to show the time of death. The fallacy in appellant's contention is clearly illustrated by viewing the Orders of the Examiner, issued June 20, 1956 (Jt. App. 9A-12A, 26A-28A) determining the heirs. Nowhere in that determination does the Examiner make use of the presumption of law to show the continuance of life of the son past the date of the father's death. On the contrary, as clearly set forth, *supra*, the correctness of the Examiner's decision can be

shown by sole reliance upon an inference of fact and without the use of the presumption of law.

The presumption was not essential to the ultimate determination. Appellant's contention that there was misapplication of the presumption is clearly erroneous and obviously fails to show error in the Examiner's determination.

2. *A determination through the use of the presumption of continuance of life that the son survived the father could not be erroneous:*—Regardless of whether or not the Examiner's determination may be supported as an inference of fact without resort to the presumption of the continuance of life to show *time* of death, the use of such presumption would not, alone, render the determination erroneous. Appellant has cited a long series of cases to the effect that the presumption of continuance of life is not applicable to determine the *time* of death during the period of seven years absence without tidings, where, at the end of which time, the *fact* of death is presumed. The correctness of these decisions could hardly be challenged here; however, it is submitted that these authorities are not controlling here.

First, the annotation at 26 L.R.A. (N.S.) 293, 294 (1910), presenting the most complete exposition of cases on this point, recognized that, "There is an irreconcilable conflict of authority * * * " on this question. The only "federal authority" cited by appellant, *Davie v. Briggs*, 97 U.S. 628 (1878), seeks to interpret North Carolina law, and, therefore, could hardly be controlling on the Secretary of the Interior as federal law since the Secretary is not bound to follow state law in these matters other than the laws of descent and distribution. Act of February 8, 1887, as amended 31 Stat. 1085, 25 U.S.C. sec. 348. *Arenas v. United States*, 197 F. 2d 418 (C.A. 9, 1952). Thus the Secretary is fully able to apply the federal rule as to the presumption of continuance of life, for to do otherwise would be clearly in error and inconsistent with the early decisions on similar issues before the Secretary (Jt. App. 32A). Appellant fails, we submit, to show adequate reason for overturning this consistent administrative construction.

The federal rule is clear that in cases where death is presumed from seven years' absence without tidings, there is a presumption of continuance of life during the period of absence. Thus, where life is shown to be in existence, it is presumed to continue through the seven years, and the absentee is presumed to have died on the last day of the seven years, *Fid. Mut. Life Assn. v. Mettler*, 185 U.S. 308 (1902); *United States v. Wildcat*, 244 U.S. 111 (1917); *Continental Life Ins. Co. v. Searing*, 240 Fed. 653 (C.A. 3, 1917); *Folk v. United States*, 233 Fed. 177 (C.A. 8, 1916); *United States v. Robertson*, 44 F.2d 317 (C.A. 9, 1930); *United States v. O'Brien*, 51 F.2d 37 (C.A. 4, 1931); *Browne v. New York Life Ins. Co.*, 57 F.2d 62 (C.A. 8, 1932); *Penn Mut. Life Ins. Co. v. Tilton*, 84 F.2d 10 (C.A. 10, 1936); *Herold v. Prudential Ins. Co. of America*, 23 F. Supp. 424 (D.C. Pa., 1937), *aff'd* 96 F.2d 996, *cert. den.* 305 U.S. 614.

The Oregon law on presumptions cannot be included in the category of laws normally intended by the terms "descent and distribution".³ Rather, as their location in the compilation of Oregon statutes show, they are really rules of evidence. However, even if Oregon law as to presumptions is applicable to the instant case, it was applicable only to the extent necessary to presume the death of Joseph Thomas, the son, thereby establishing the heirship of his heir-at-law, Emma Luton (Jt. App. 17A). The Oregon statute dealing with death by presumption, O.R.S. 41.360 (26), *supra*, p. 4, merely embodies the common law rule of universal application that where there is an unexplained absence for more than seven years, death may be presumed. *Hefford v. Metropolitan Life Ins. Co.*, 173 Or. 353, 144 P.2d 695 (1944). Nor is the Oregon law relating to presumption of continuance of life, even if applicable, in conflict with the federal rule, O.R.S. 41.360 (32), *supra*, p. 4. It is clear from the leading case before the Oregon Supreme Court on this point, *Fink v. Prudential Ins. Co.*, 162 Or. 37,

³ State Adoption laws are not considered laws of descent and distribution, and are not controlling on the Secretary's determination of heirship. *Arenas v. U.S.*, *supra*.

90 P. 2d 762 (1939), that a person once proved to be living is presumed to live until proven otherwise, *i.e.*, until such presumption is overcome by a stronger presumption, such as that of death from seven years unexplained absence.

The Secretary's decision, therefore, applying the presumption of continuance of life is adequately sustained by the law and is plainly correct.

3. *The determination by the Examiner that the son is dead is correct:*—Findings of fact by the Examiner on the basis of the evidence presented showed that the son had disappeared in August 1939, and that despite diligent search, no word had been heard from him since that time (Jt. App. 26A). The Examiner's Order was dated June 20, 1956 (Jt. App. 28A). This indicated that there was a lapse of approximately seventeen years without word from the absentee. The Examiner in his order selected the date of death as exactly seven years after the date of disappearance. This particular date appears to be great cause of complaint on the part of appellant; however, we submit that the exact date after the first 13 months of his disappearance is completely immaterial; what is significant is the *fact of death*.

Since the son disappeared under circumstances which would explain his absence at least for 13 months, the rule of unexplained absence for seven years giving rise to a presumption of death might appear inapplicable to place the *date* of death seven years after the disappearance. While this might be true, the fact remains that the son was absent for a total of 17 years. Therefore, at some stage of his absence the initial explanation for his disappearance would be reasonably expected to expire. The testimony of Joseph's friend, Tony Benson, is helpful at this point (Jt. App. 42A-45A). At the time of his disappearance Joseph was employed at a C.C.C. Camp at the salary, which information appellant gratuitously supplies, of \$30 per month. In August 1939, Joseph borrowed a shirt from Tony and proceeded with him in Tony's car to Portland. On arrival they split up and arranged to meet later in the day—Joseph failed to meet the appointment and was not heard

from again. Benson testified also that income was accruing to Joseph at the Indian Agency, but there was no evidence as to the amount or how often Joseph collected his share. A fair inference is that it could hardly have been a large sum since Joseph was willing to take a job of considerable physical labor at \$30 per month. Furthermore, he could reasonably believe that it would continue to accrue to his account during his absence. He had no family or other personal ties; therefore, leaving his C.C.C. job could hardly amount to a desertion of the "things men normally count of value in life." His absence could easily be explained in its initial stages, therefore, as an attempt to broaden his then limited economic horizons. This inference goes beyond "pure guesswork" and can be considered as the probable course of events.

However, when this absence was prolonged to 17 years without tidings, no reasonable man could refuse to infer that Joseph had somehow met his death during that time. In addition to the *inference* of the fact of death from the prolonged absence without explanation, the common law *presumption* of death arises from the basic fact that during at least the last 16 of the 17 years absence, such absence was unexplained.

Viewing again the date of death selected by the Examiner, it hardly seems fatal to the ultimate finding of the fact of death that this particular date was selected. It appears to make little difference that this date or any other date was selected so long as it was after the period for which an explanation for absence was available. The material facts were life at the time of the father's death, and death at the time of the Examiner's Order. The findings establishing these facts are clearly correct. Thus, the finding of death as an inference of fact is adequately supported by the evidence. Furthermore, the conclusion of death as a presumption of law is equally beyond dispute and is plainly correct as a matter of law on the basis of the facts presented.

CONCLUSION

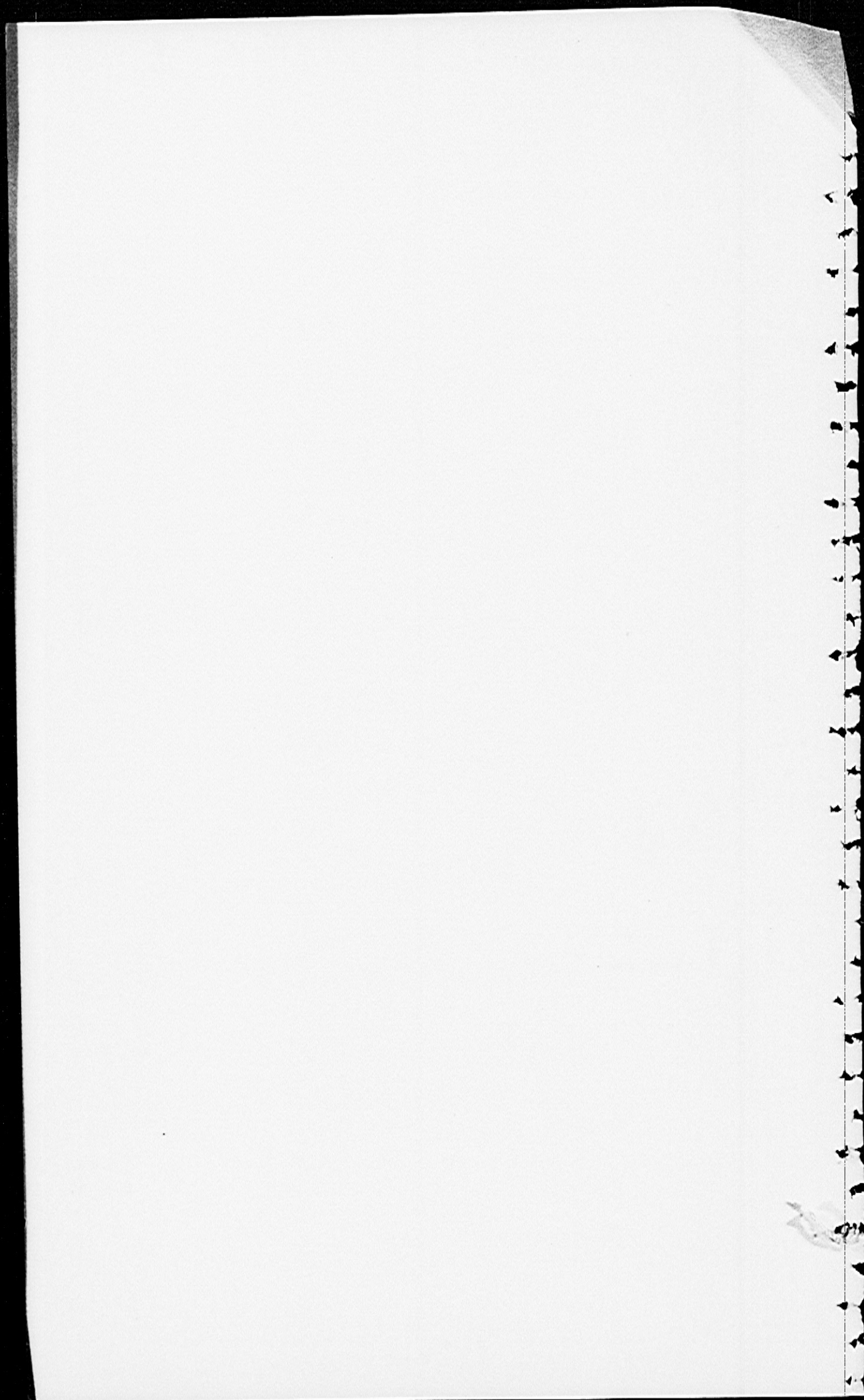
For the reasons stated, it is submitted that the judgment of the district court should be affirmed.

Respectfully,

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January 1959



No. 14,813

REPLY BRIEF FOR APPELLANT

*United States Court of Appeals
For the
District of Columbia Circuit*

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Joseph W. Stewart

CLERK

JOE HAYES,

Appellant

v.

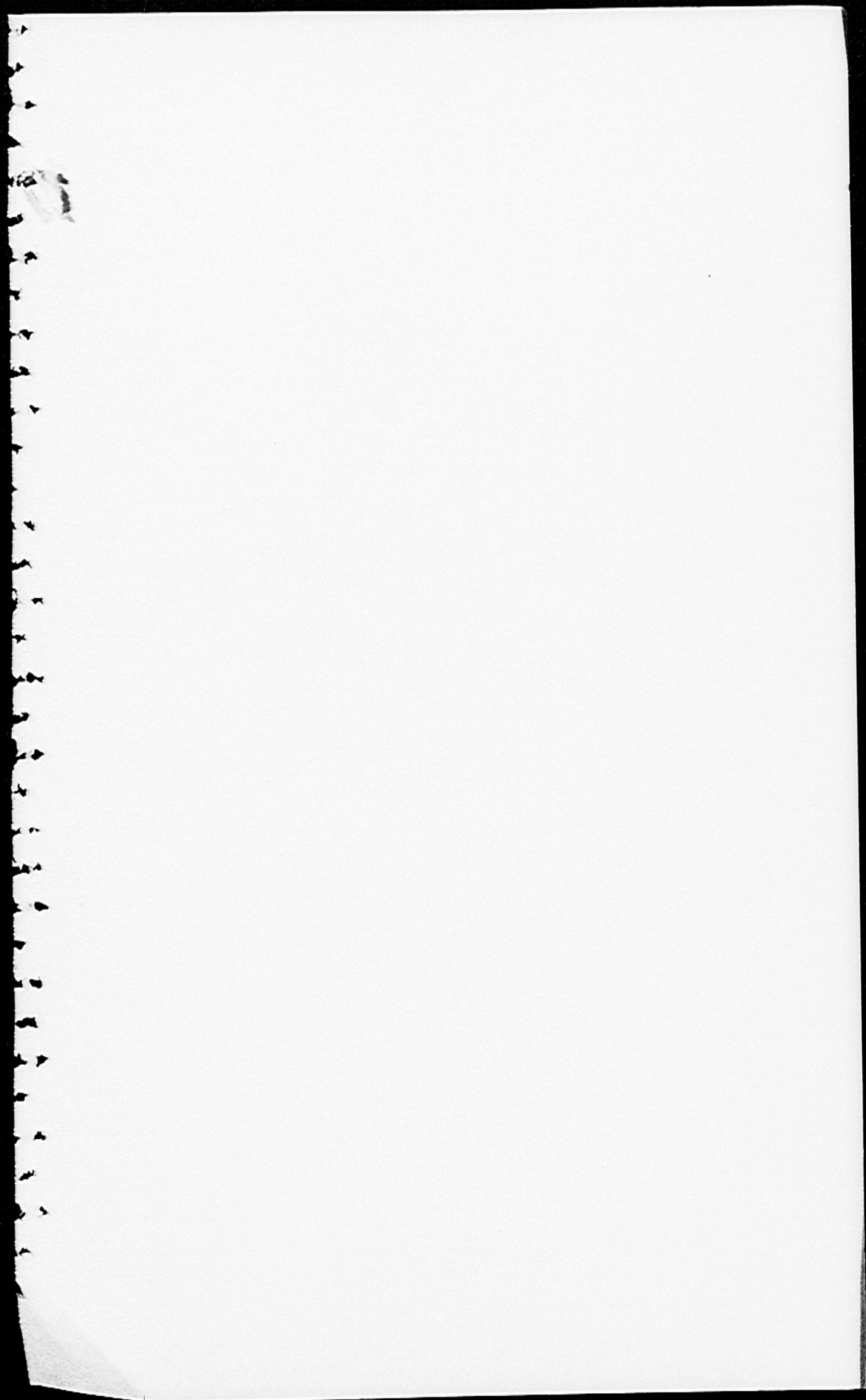
FRED A. SEATON, Secretary of the Interior,
Appellee

Appeal from an Order of the United States
District Court for the District of Columbia

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IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,813

JOE HAYES,
Appellant

v.

FRED A. SEATON, Secretary of the Interior,
Appellee

**Appeal from an Order of the United States
District Court for the District of Columbia**

REPLY BRIEF FOR APPELLANT

THE DISTRICT COURT HAD JURISDICTION

The decision of the Secretary of the Interior or his delegated representative presuming the death of an Indian and determining his heirs is not final and conclusive. It is reviewable by the courts on the grounds of administrative error in the application of the rules of law to the facts of record.

The Federal Courts have uniformly ruled that where there is an error in the application of the rules of law by an administrative agency, they will assume jurisdiction to review the administrative determination. In *United States v. Neelly*, 207 F. 2d 281, 284 (1953) the circuit court expressed this rule as follows:

"Courts will not interfere with administrative determinations unless, upon the record, the proceedings were manifestly unfair, or substantial evidence to support the administrative findings is lacking, or *error of law* has been committed, or the evidence reflects a manifest abuse of discretion." (Emphasis supplied)

The Supreme Court of the United States stated this rule similarly in *Kessler v. Strecker*, 307 U.S. 22, 34 (1938) when it said,

"The proceeding for deportation is administrative. If the hearing was fair, if there was evidence to support the finding of the Secretary, and if no *error of law* was committed, the ruling of the Department must stand and cannot be corrected in judicial proceedings. If, on the other hand, one of the elements mentioned is lacking, the proceeding is void and must be set aside." (Emphasis supplied).

Appellee contends, however, that the words "final and conclusive" contained in section 1 of the Act of June 25, 1910 precludes a review by the courts of the Secretary's determination.

However, Section 2 of the Act of June 25, 1910, which deals with allotments disposed of by will, contains no language to the effect that the Secretary's determination shall be "final and conclusive".

For the record, it should be noted that since John Thomas did make a will, the estate of John Thomas falls within the purview of Section 2 of the Act of June 25, 1910, which contains no "final and conclusive" language. Thus, even if the words "final and conclusive" were to preclude judicial review, as appellee alleges, it would be inapplicable to the estate of John Thomas.

This view was cogently expressed by Judge Prettyman in the case of *Homovich v. Chapman*, 191 F. 2d 761, 764 (1951) when he stated:

"The Secretary maintains that his action in respect to the wills of Indians is not reviewable by the courts. But the actions of Secretaries in respect to these wills have been reviewed by the courts, and no case to the contrary is cited to us. The Secretary argues that, because Section 1 of the 1910 Act, dealing with the determination of the heirs of an Indian who dies without a will provides that his determination 'shall be final and conclusive', therefore, Section 2 of that Act, dealing with wills, must be read as though it contained a similar provision, although in fact it does not. We think it plain that, if Congress had meant that the decisions in Section 2 should be final and conclusive, it would have said so; in the immediately preceding paragraph it had so provided when it meant to do so."

Let us next consider the question of the effect to be given the words "final and conclusive". As the Supreme Court stated in *First Moon v. White Tail*, 270 U. S. 243 (1926):

"The question presented must be regarded as settled by what this court has said in *Hallowell v. Commons*, 239 U.S. 506; *Lane v. Mickadiet*, 241 U.S. 201; . . ."

The case of *Lane v. Mickadiet*, *supra*, involved a determination of heirs by the Secretary of the Interior under the 1910 Act. Concerning the effect to be given the words "final and conclusive", the Supreme Court stated at page 209:

" . . . The words "final and conclusive" describing the power given to the Secretary must be taken as conferring and not as limiting or destroying that authority. In other words they must be treated as absolutely excluding the right to review in the courts, as had hitherto been the case under the act of 1887, *the question of fact* as to who were the heirs of an allottee, thereby causing that *question* to become one within the final and conclusive competency of the administrative authority." (Emphasis supplied)

Read properly, one must conclude that the "final and conclusive" authority conferred upon the Secretary relates

to "the question of fact". Thus, it is apparent, that the authority of the Secretary is final and conclusive with respect to questions of fact. As we have seen, this in no way precludes review by the courts in the event of fraud, error of law, or gross mistake of fact.

In holding that the words "final and conclusive" meant conclusive as to questions of fact, the Supreme Court in *Lane v. Mickadiet* was applying the same principle it applied earlier, in the same term, in the case of *Gegiow v. Uhl*, 239 U.S. 3 (1915). In the *Gegiow* case the court interpreted the word "final" as regards the decision of an immigration officer under Section 25 of the Act of February 20, 1907, 34 Stat. 898. That act provided:

"That in every case where an alien is excluded from admission into the United States, under any law or treaty now existing or hereafter made, the decision of the appropriate immigration officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of Commerce and Labor..."

Speaking for the Court at page 9, Justice Holmes stated:

"The conclusiveness of the decisions of immigration officers under Section 25 is conclusiveness upon *matters of fact*." (Emphasis supplied)

The rule that the courts may review an administrative determination where there is an error in the application of the law to the facts of record has been specifically applied to a Secretarial determination under Section 1 of the Act of June 25, 1910. Thus in the case of *Dixon v. Cox*, 268 F. 285 (C.C.A. 8, 1920) the court stated:

"The conclusion of this court, therefore, is that the Act of June 25, 1910, which grants to the Secretary of Interior jurisdiction to ascertain and determine who were the legal heirs of the Indian Allottees . . . was constitutional and valid, the decisions of those questions in such cases of the Secretary of the In-

terior are final and conclusive, and his determination . . . is neither subject to collateral attack nor reviewable by the courts, in the absence of pleading and proof of *fraud, error of law, or gross mistake of fact.*" (Emphasis supplied).

The Eighth Circuit in *Bowling v. United States*, 299 F. 438, 444, expressly reiterated and affirmed the position it took on the reviewability of the Secretary's determination in the case of *Dixon v. Cox, supra*, when it stated:

"And such findings are conclusive in the absence of a showing of *fraud, error of law, or gross mistake of fact.* *Dixon v. Cox* (C.C.A. 268 Fed. 285; *Chase v. U.S.*, (C.C.A. 272 Fed. 684)."

It is significant to note that the view of the 8th Circuit enunciated in *Dixon v. Cox* and *Bowling v. United States*, in this regard, is also shared by the Department of the Interior in *Federal Indian Law*, recently published by the defendant. Thus, on page 78 of this text we find the following:

"A determination made by the Secretary under applicable law is 'final and conclusive' and not subject to collateral attack or court review *in the absence of a showing of fraud, error of law, or gross mistake of fact.* . . ." (Emphasis supplied).

As authority for this proposition, the text cites the case of *Peoria Tribe or Band of Indians v. Wea Townsite Co. et al.*, 117 F. 2d 940 (1941). In the *Peoria Tribe* case, the Tenth Circuit court stated:

"The Act of June 25, 1910, 36 Stat. 855, 25 U.S.C.A. sec. 372, empowered the Secretary of the Interior to determine the heirs of an Indian to whom an allotment of land has been made who dies intestate before the expiration of the trust period . . . and Wea died January 23, 1894, before the expiration of the trust period. It follows that the Secretary of the Interior had exclusive jurisdiction to determine the heirship. His decision is final and conclusive and not subject to collateral attack or review by the courts *in the ab-*

sence of a showing of fraud, error of law, or gross mistake of fact . . ." (Emphasis supplied).

Consequently we have the 10th circuit, the 8th circuit, and the Interior Department in "Federal Indian Law" all sharing the view that the courts may review the Secretary's determination as to heirship in the event of fraud, error of law or gross mistake of fact.

In the preface to "Federal Indian Law" the Solicitor of the Department of the Interior, Mr. Elmer F. Bennett, says: "Both Mr. Armstrong and I have intended and directed that this revision should reflect high standards of objective scholarship." Reflecting these "high standards of objective scholarship" the Department in "Federal Indian Law" concluded that the Secretary's determination can be reviewed by the courts in the event of a showing of fraud, error of law, or gross mistake of fact. Is the defendant abandoning those "high standards of objective scholarship" when, in the role of litigant in this case, it resolutely denies this court's jurisdiction to review his determination?

The case of *Arenas v. United States*, 197 F. 2d 418 (C.C.A. 9, 1952), cited by appellee, furnishes no support whatever for appellee's assertion that the Secretary's determination may not be reviewed on the grounds of error of law. The *Arenas* case merely reiterated the position taken by the court in *Hallowell v. Commons*, 239 U.S. 506, that the Act of 1910 withdrew the *original* jurisdiction of District Courts to determine the heirs of Indians and placed such *original* jurisdiction in the Secretary of the Interior.

The cases cited herein by appellant clearly establish the appellate jurisdiction of this court and the court below to review the administrative record in the matters of the Estate of John Thomas and the Estate of Joseph Thomas for the purpose of determining whether there has

been an error or errors in the application of the law to the facts in these cases.

It would appear that, in essence, the denial, by appellee, of the courts' jurisdiction to review his determination where error of law exists, indicates an attempt on the part of the Secretary of the Interior to arrogate to himself the appellate functions of the judiciary.

If judicial review is not available to appellant, Joe Hayes (as appellee contends), when the judiciary concludes that legal error exists in the Secretary's determinations, then the authority of the Secretary of the Interior must be construed to be absolute—so absolute as to be inconsistent with the basic concept of government under law.

The Secretary's Determinations Were In Error

This action was brought by appellant to review and set aside two probate orders entered by appellee in two separate estates. The first is the Estate of John Thomas, who left a will. The second is the Estate of Joseph Thomas, who did not leave a will.

On September 22, 1940, John Thomas, an Indian residing in Oregon, died, leaving a will in which he devised his "restricted" property to his son Joseph Thomas. But the devisee, Joseph Thomas, disappeared on August 3, 1939, thirteen months prior to the death of his father, and has not been heard from since his disappearance.

Under date of June 20, 1956, the Examiner made an "Order Approving Will and Determining Heir of Subsequently Deceased Devisee" in the Estate of John Thomas. In this order the Examiner stated the following:

"A decree has been issued this date in the estate of Joseph Thomas, *presuming* him to have died on August 3, 1946, at the age of 35 years, which was 7 years from the time of his disappearance. (Jt. App. 10A) (Emphasis supplied)

Under date of June 20, 1956, the Examiner made an "Order of Presumption of Death and Determining Heirs" in the Estate of Joseph Thomas. In this order the Examiner stated the following:

"Joseph Thomas is hereby *presumed* to have died intestate, and the *date of his death* is determined to have been on August 3, 1946, at the age of 35 years" (Jt. App. 27a) (Emphasis supplied).

Appellant contends that the Secretary of the Interior through his delegated representative erred in presuming the date of death of Joseph Thomas to be August 3, 1946, this date being seven years from the date of his disappearance, and thereby also presuming that Joseph Thomas survived his father, John Thomas.

Appellee, in his brief, now advances a completely new theory regarding the alleged survivorship of Joseph Thomas, which is at variance with the position asserted by him in the court below.

At page 13 of his brief, appellee, now asserts in this court that the Examiner's determination that Joseph Thomas survived his father was based on evidence and not on a presumption of law.

Let us examine appellee's present contention in detail.

Appellee states:

"The fallacy in appellant's contention is clearly illustrated by viewing the Orders of the Examiner, issued June 20, 1956 (Jt. App. 9A-12A, 26A-28A) determining the heirs. *Nowhere in that determination does the Examiner make use of the presumption of law to show the continuance of life of the son past the date of the father's death.*" (p. 13 of appellee's brief) (Emphasis supplied)

In contrast with the above statement made by appellee to this court, Appellant respectfully invites the attention of the court to the following statements made by Appellee to the court below:

"The Secretary of the Interior on the other hand, has made *the presumption* that Joseph Thomas *continued to live until the last day of the 7-year period after he disappeared in 1939 or until 1946*. For the following reasons, it is submitted that it is well-established under Oregon Law that *the presumption* made by the Secretary is the correct one." (Page 11, Memorandum of Points and Authorities in Support of Defendant's Motion for Judgment on the Pleadings or for Summary Judgment, filed by appellee in the Court below on June 30, 1958)

From the foregoing statement by appellee in the Court below, it is apparent that the Examiner did "make use of the presumption of law to show the continuance of life of the son past the date of the father's death."

Appellee now claims that the examiner's determination that Joseph Thomas survived his father is based on evidence and can be sustained "without the use of the presumption of law."

Contrary to appellee's present assertion to this court, appellee expressly stated in the court below that there was *no evidence sufficient to show that Joseph Thomas survived his father, John Thomas*. This statement is as follows:

"No evidence was presented on behalf of Emma J. Luton tending to show that Joseph Thomas survived his father. Therefore, the situation is that Joseph Thomas disappeared in 1939, *but that there is no evidence sufficient to show whether Joseph Thomas did or did not survive John Thomas, his father.*" (Memorandum of Points and Authorities in Support of Defendant's Motion for Judgment on the Pleadings or for Summary Judgment, at page 11, filed by appellee in the court below on June 30, 1958). (Emphasis supplied).

On page 13 of his brief, appellee states that:

"Nowhere in that determination does the Examiner make use of the presumption of law to show the con-

tinuance of life of the son past the date of the father's death".

This statement, however, does not deter the appellee from asserting the applicability of such a presumption of law in support of the Examiner's determination. Thus on page 14 of his brief, appellee states:

"Thus the Secretary is fully able to apply the federal rule as to the presumption of the continuance of life."

Appellee states the "federal rule", as he understands it, as follows:

"The federal rule is clear that in cases where death is presumed from seven years' absence without tidings, there is a presumption of continuance of life during the period of absence. Thus, where life is shown to be in existence, it is presumed to continue through the seven years, and the absentee is presumed to have died on the last day of the seven years."

Appellee is saying, in effect, that when a person is presumed to be dead after seven years' unexplained absence, the date of death is also presumed.

Let us examine the cases cited by appellee, to determine whether or not they afford any support for his contention.

In the cases of

- Fid. Mut. Life Assn. v. Mettler*, 185 U.S. 308 (1902)
- Continental Life Ins. Co. v. Searing*, 240 F. 653 (C.C.A. 3, 1917)
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the Courts held that there was sufficient evidence to show that the person who had disappeared had been subjected

to specific peril causing his death, and consequently the legal presumption of the continuance of life was overcome.

The cases of *United States v. Wildcat*, 244 U.S. 111 (1917), and *Folk v. United States*, 233 F. 177 (C.C.A. 8, 1916), involved determinations by the Dawes Commission that certain Indians were entitled to be enrolled as citizens by blood of the Creek Tribe. The Dawes Commission upon the best information available to it determined that these Indians were so entitled. These determinations were challenged, and the Commission was upheld by the courts. These cases did not involve a situation in which a person was presumed to be dead after 7 years' unexplained absence, and they are, therefore, obviously inapplicable.

In the cases of *United States v. Robertson*, 44 F. 2d 317 (C.C.A. 9, 1930) and *Browne v. New York Life Ins. Co.*, 57 F. 2d 62 (C.C.A. 8, 1932), the courts held that appellants who were seeking to collect on life insurance policies could not collect because they had failed to establish that the insured had died during the life of the Insurance policy.

None of the "federal cases" cited by appellee support his contention.

Let us consider next the case of *Fink v. Prudential Ins. Co.*, 162 Or. 37, 90 P. 2d 762 (1939), also cited by appellee in support of his position, and characterized by him as the "leading case before the Oregon Supreme Court on this point".¹

¹ The extent to which the appellee relies on the *Fink* case to support his contention may be evident by the statement made by him in the court below which reads:

"The Secretary of the Interior, on the other hand, has made the presumption that Joseph Thomas continued to live until the last day of the 7 year period after he disappeared in 1939 or until 1946. For the following reasons, it is submitted that

tinuance of life of the son past the date of the father's death".

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None of the "federal cases" cited by appellee support his contention.

Let us consider next the case of *Fink v. Prudential Ins. Co.*, 162 Or. 37, 90 P. 2d 762 (1939), also cited by appellee in support of his position, and characterized by him as the "leading case before the Oregon Supreme Court on this point".¹

¹ The extent to which the appellee relies on the *Fink* case to support his contention may be evident by the statement made by him in the court below which reads:

"The Secretary of the Interior, on the other hand, has made the presumption that Joseph Thomas continued to live until the last day of the 7 year period after he disappeared in 1939 or until 1946. For the following reasons, it is submitted that

In the *Fink* case the court stated in part:

"But we all know that there are instances of disappearance of men from whom no tidings have been received which can be explained without presuming death. In some of these domestic discord had developed . . . In all of these the failure to communicate with those at home can be explained without presuming death."

The court found from the facts adduced in the *Fink* case that Fink deserted and abandoned his family "His departure and the circumstances immediately preceding it indicate that he planned a break from home and family." Accordingly, the court concluded:

"The above being the facts Fink's failure to return home and to communicate with his family can be explained without presuming death. And since his absence and the lack of tidings from him can be explained without believing that he died, the law will indulge in *no presumption of death*. (Emphasis supplied).

The court in the *Fink* case refused to presume the insured to be dead after seven years absence.

In contrast to the *Fink* case, the Examiner found that the facts in the Joseph Thomas case "were overwhelmingly such as to raise a legal presumption of death under the Oregon Statute." (Jt. App. 39A). Accordingly, the

it is well-established under Oregon law that the presumption made by the Secretary is the correct one." *

"This Court can determine otherwise only by overruling the decision of the Supreme Court of the State of Oregon in the *Fink* Case." **

* Page 11, Memorandum of Points and Authorities in Support of Defendant's motion for Judgment on the Pleadings or for Summary Judgment, filed by appellee in the Court below on June 30, 1958.

** *ibid* p. 13

Examiner presumed Joseph Thomas to be dead after seven years of unexplained absence.

It is clear, therefore, that the *Fink* case, in which the Supreme Court of Oregon refused to presume *Fink* to be dead after seven years absence, furnishes no support for appellee's determinations in the Estates of John and Joseph Thomas. For in the Estates of John and Joseph Thomas, Joseph was presumed, by the Examiner, to be dead after seven years unexplained absence.

The Examiner was correct in presuming that Joseph Thomas was dead after seven years unexplained absence. However, the Examiner erred when he presumed that the date of death of Joseph was August 3, 1946 (7 years from the date of his disappearance), and when he presumed therefore, that Joseph Thomas survived his father, John Thomas.

The effect of invoking the presumption of death in the Joseph Thomas disappearance is that of overcoming or displacing the presumption of the continuance of life. This rule is cogently set forth in 17 C. J. at pages 1165 and 1166:

"When a person is shown or appears to have been living at a certain time, in the absence of proof to the contrary, the presumption is that he is still alive, *until this presumption is overcome by the more potent presumption of his death.*" (Emphasis supplied).

"The presumption of the continuance of life is *overcome* or *displaced* by the presumption of death which arises from the unexplained absence of a person from his last or usual place of residence for a sufficiently long period of time without having been heard of during such period . . ." (Emphasis supplied).

This rule is also clearly expressed in *Brown v. New*

York Life Ins. Co., 57 F. 2d 62, 63 (C.A. 4, 1931)¹ as follows:

"The law presumes that a person shown to be alive at a given time remains alive until the contrary is shown by proof, or, in the absence of proof, until a different presumption arises. At the close of a continuous unexplained absence from his last or usual place of residence for a period of seven years, without having been heard of during such time, *the presumption of the continuance of life is overcome*, and a presumption of death arises."

"The presumption [of death] is not a presumption of the time of death. That must be determined by the facts and circumstances of the case."

This rule is also stated in *Penn Mut. Life Ins. Co. v. Tilton*, 84 F. 2d 10, 13 (C.A. 10, 1936)² as follows:

"The presumption of death from unexplained absence is a familiar doctrine. In the absence of a controlling statute providing otherwise, it is presumed in law that a person continues to live seven years after his unexplained disappearance, and, if he is not seen alive and his relatives, associates or friends with whom he would naturally communicate receive no word from him, *the presumption of life terminates at the end of such period* and that of death arises."

It is clear from a review of the foregoing cases and authorities, that the Examiner erred when, at the same time he presumed that Joseph Thomas died after seven years unexplained absence, he also presumed that Joseph Thomas survived his father, and when he fixed the date of Joseph's death as August 3, 1946 (seven years after his disappearance).

Appellee concedes the correctness of the long series of cases cited and discussed at some length by appellant in his brief, and appellee states "The correctness of these

¹ & ² These cases are cited approvingly by appellee on page 15 of his brief.

decision could hardly be challenged here; however, it is submitted that these authorities are not controlling here." But it should be noted that appellee fails to show why the cases cited by appellant are not controlling here.

Appellant frankly confesses to some surprise at the assertion of appellee at page 14 of his brief that the opinion of the Supreme Court in *Davie v. Briggs*, 97 U.S. 628 (1878), is not controlling here. For the record discloses that, in the past, appellee has repeatedly cited *Davie v. Briggs*, supra, as being in point and applicable. Appellant invites the attention of the court to verbatim quotations from statements of the Examiner of Inheritance, the Acting Solicitor, and the appellee in the Court below which cite *Davie v. Briggs*:

Examiner's citation of *Davie v. Briggs*

"In the case of *Davie v. Briggs*, October 1878 (97 U.S. Reports 628), which appears to be about the only supreme court case touching on the subject, the court stated: . . ."

(Jt. App. 31 A—Examiner's order denying petition for rehearing).

Acting Solicitor's citation of *Davie v. Briggs*

"In *Davie v. Briggs*, supra, the court said:

'If it appears in evidence that the absent person within the seven years, encountered some specific peril, or within that period came within the range of some impending or immediate danger, which might reasonably be expected to destroy life, the Court or jury may infer the life ceased before the expiration of the seven years.'

"In the same case the court cited Taylor's Treatise on the Law of Evidence (Sec. 157) that

"* * * although a person who had not been heard of for seven years is presumed to be dead, the law raises

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(Jt. App. 18 A—Decision dated Nov. 6, 1957, of Acting Solicitor of the Dep't of the Interior.)

Appellee's citation of *Davie v. Briggs* in the Court below

"The Applicable rule of law is set forth in the following quotation from Taylor's Treatise on the Law of Evidence, sec. 157, as follows:

"* * * if any one has to establish the precise period during those seven years at which some person died, he must do so by evidence, and can neither rely, on the one hand, on the presumption of death, nor on the other, upon the presumption of the continuance of life.'

"The above is quoted with approval in the case of *Davie v. Briggs*, 97 U.S. 628 (1878)."

(Memorandum of Points and Authorities in Support of Defendant's Motion for Judgment on the Pleadings or for Summary Judgment, at page 12, filed by appellee in the Court below on June 30, 1958).

Appellee failed to disclose to this court that *Davie v. Briggs* was cited as authoritative and in point by the Examiner of Inheritance, the Acting Solicitor of the Department of the Interior, and by the appellee, himself, in the court below. Moreover, he furnishes no valid explanation for his abandonment and rejection of this leading federal case.

Appellee has failed ^{to} ~~at~~ meet our argument that the burden of proof rested on Emma J. Luton to show by affirmative evidence that the devisee, Joseph Thomas, sur-

vived the testator, John Thomas; that because of her failure to sustain this burden of proof, the devise to Joseph Thomas lapsed, and the Estate of John Thomas descends to Joe Hayes as the next of kin, and heir-at-law, of John Thomas, instead of Emma J. Luton.

Respectfully submitted

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800 Pacific Building
Portland, Oregon
Attorneys for Appellant

No. 14,813
JOINT APPENDIX

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA

JOE HAYES,
Appellant,

v.

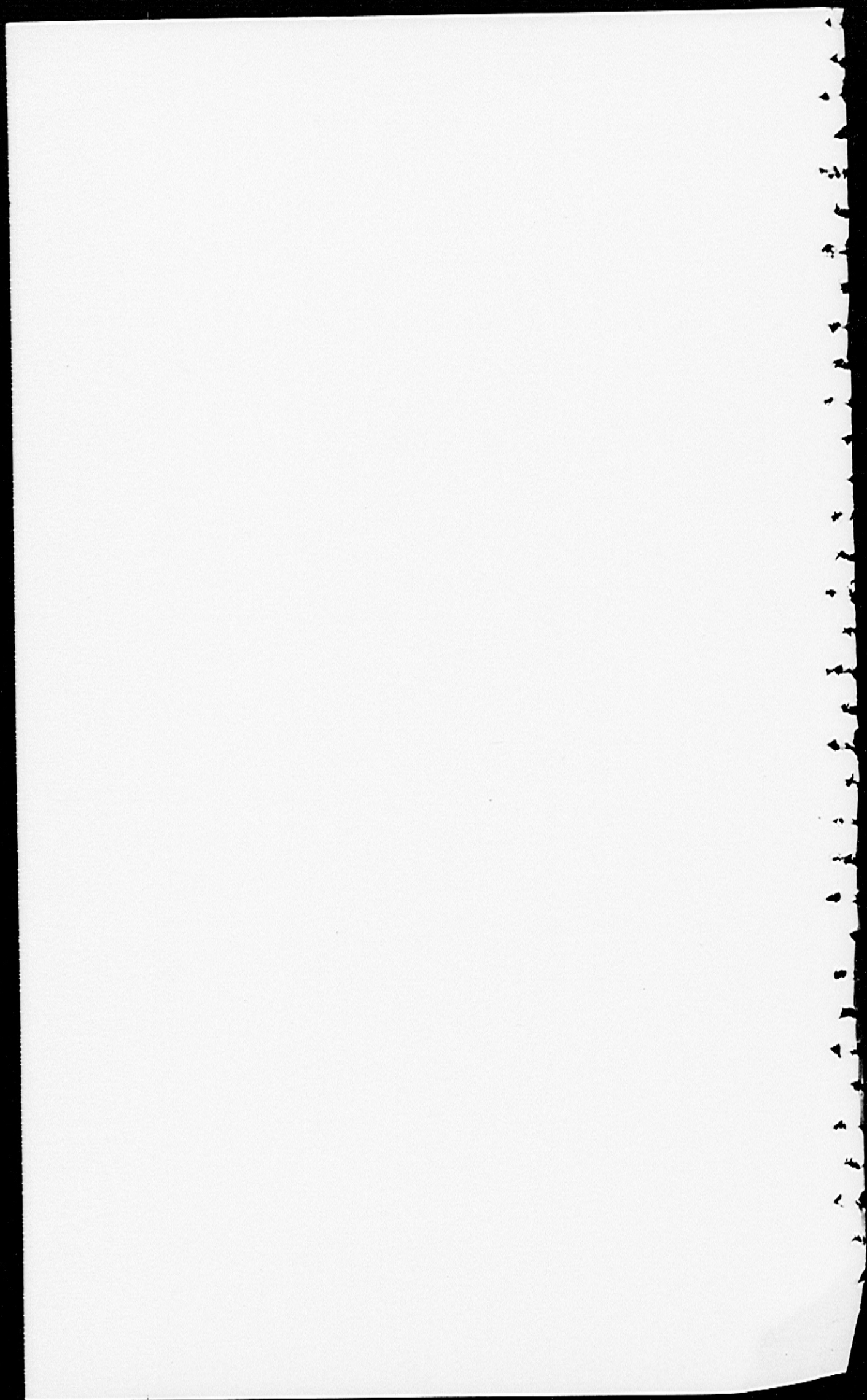
FRED A. SEATON, Secretary of the Interior
Appellee.

**Appeal from the United States District Court
for the District of Columbia**

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED JAN 2 1959

Joseph W. Stewart
CLERK



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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 14,813

JOE HAYES,
Appellant,

v.

FRED A. SEATON, Secretary of the Interior
Appellee.

Appeal from the United States District Court
for the District of Columbia

JOINT APPENDIX

Filed April 3, 1958

Harry M. Hull, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 859-58

Joe Hayes
R. F. D. # 1
Adams, Oregon
Plaintiff

v.

Fred A. Seaton
Secretary of The
Department of The Interior
Washington, D. C.
Defendant

COMPLAINT

(For Review of and to Set Aside an Administrative
Order, For Declaratory Judgment and for Injunction)

1. This Court has jurisdiction of this action pursuant to the provisions of Section 10 of the Administrative Procedures Act (60 Stat 237, 243; 5 U.S.C. 1009). The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.
2. Plaintiff, an Indian, is a domiciled resident citizen of the United States and of the State of Oregon, and is the surviving cousin of John Thomas, an Indian who died testate in Oregon on September 22, 1940.
3. Defendant Fred A. Seaton is the Secretary of the Interior of the United States. Defendant maintains his office and official residence in the District of Columbia,

and is subject to suit by plaintiff in the District of Columbia.

4. At the time of his death, the aforesaid John Thomas was a domiciled resident of the United States and of the State of Oregon, and was the owner of certain property appraised by a government official at \$63,811.09, and described and ordered distributed in a certain order dated June 20, 1956 entitled "ORDER APPROVING WILL AND DETERMINING HEIR OF SUBSEQUENTLY DECEASED DEVISEE". Said order was issued by defendant, acting by and through R. J. Montgomery, Examiner of Inheritance, IN THE MATTER OF THE ESTATE OF John Thomas, Cayuse No. 223 of the Umatilla Indian Agency, Pendleton, Oregon, being probate matter No. 16742-41; 422-47; 16056-52; 7324-54; 12282-54; E-149-56 of the Department of the Interior of the United States of America. A copy of said "ORDER APPROVING WILL . . ." is attached hereto as Exhibit 1 and, by reference, is incorporated herein and made a part hereof.

5. Defendant Fred A. Seaton, as Secretary of the Interior, exercises administrative control, possession and custody of the said estate of John Thomas, deceased.

6. The essential facts in this case are as follows: On September 22, 1940, John Thomas (Testator), a resident of Oregon died testate leaving a restricted estate valued at approximately \$63,811.00. Subsequent probate proceedings revealed that on October 13, 1923, John Thomas executed a will "which devised his entire estate, with the exception of some unrestricted personal property, to his son, Joseph Thomas." However, the record shows that on or about August 3, 1939, Joseph Thomas disappeared, and has not been heard of to date. By the aforesaid Order of the Examiner of Inheritance (Exhibit 1), dated June 20, 1956, the said Joseph Thomas

was "... presumed to have died intestate on August 3, 1946, at the age of 35 years, being seven years from the time of his disappearance, leaving a restricted estate valued at \$6,259.53. Orders by the Examiner of Inheritance in these estates, both dated June 20, 1956, approved the will of John Thomas dated October 13, 1923, which devised his entire estate, with the exception of some unrestricted personal property to his son, Joseph Thomas, and determined that Joseph Thomas was survived by his maternal half brother, Samuel J. Luton, who was found to be entitled to the entire estate of Joseph Thomas and further found that Samuel J. Luton died December 13, 1954, intestate, leaving as his only heir at law, his wife, Emma J. Luton. By these findings, both estates vested in Emma J. Luton." In presuming Joseph Thomas to be dead, the Examiner applied Oregon Statute (O.R.S. 41.360(26)) which provides that a party not heard from for seven years is presumed to be dead.

7. Thereafter, plaintiff duly and timely filed a petition for rehearing in the joint matter of the Estate of John Thomas, deceased Cayuse Allottee No. 223 and Joseph Thomas, deceased Umatilla Allottee No. 877. Said petition for rehearing was denied by decision of an Examiner of Inheritance by order dated August 22, 1956. Thereafter, plaintiff duly and timely appealed the aforesaid decisions of the Examiner of Inheritance to Defendant. On November 6, 1957, acting by and through Edmund T. Fritz, then Acting Solicitor of the Department of the Interior, defendant issued a decision and order affirming the aforesaid Examiner's "ORDER APPROVING WILL . . ." (Exhibit 1) and order denying plaintiff's petition for rehearing, and directed the Superintendent of the Umatilla Indian Agency, Pendleton, Oregon, to distribute the decedent's estate in accordance with the Examiner's order dated June 20, 1956. A copy of Defendant's said decision and order dated November 6, 1957, is attached hereto as Exhibit 2 and, by reference, is incorporated

herein and made a part hereof. By letter dated December 18, 1957, defendant afforded plaintiff additional time to perfect and file a motion for reconsideration on the grounds of newly discovered evidence. A motion for reconsideration on the grounds of newly discovered evidence was duly and timely filed by the plaintiff and in addition on January 24, 1958, plaintiff filed a "Request for Reconsideration of Solicitor's Opinion Dated November 6, 1957—Re: Estate of John Thomas, Deceased . . . On the grounds of Gross Error of Law". A copy of said letter of January 24, 1958, is attached hereto as Exhibit 3 and, by reference, is incorporated herein and made a part hereof. On April 1, acting by and through Edmund T. Fritz, Deputy Solicitor of the Department of the Interior, defendant addressed a letter to one of plaintiff's attorneys denying plaintiff's requests for reconsideration, and authorized the superintendent of the Umatilla Agency to distribute the assets of the estate in accordance with the Examiner's decision of June 20, 1956. A copy of said letter of April 1, 1958 is attached hereto as Exhibit 4 and, by reference, is incorporated herein and made a part hereof.

8. Plaintiff has exhausted all administrative remedies and procedures available to prevent the distribution of the estate of the aforesaid John Thomas in accordance with the defendant's aforesaid "Order Approving Will . . ." (Exhibit 1), and to obtain an order from defendant recognizing plaintiff as the owner of the estate of John Thomas, deceased.

9. The aforesaid "Order Approving Will . . ." (Exhibit 1) and the decision of the Solicitor dated November 6, 1957 (Exhibit 2) are erroneous, illegal and without authority in law. Plaintiff is adversely affected and aggrieved thereby, and is entitled to review of said administrative decisions by this Court in this action, because no other remedy is provided by law, or otherwise exists,

for review of said decisions in any court of competent jurisdiction.

WHEREFORE, plaintiff demands that this court:

a) Review, reverse, set aside and annul defendant's aforesaid administrative decisions, and forever enjoin and restrain defendant from distributing, and from authorizing or permitting the distribution of the aforesaid property embraced in the estate of John Thomas, deceased, in accordance with the aforesaid "Order Approving Will . . ." dated June 20, 1956 (Exhibit 1).

b) Adjudge, determine and declare that by right of inheritance, plaintiff owns and is entitled to the aforesaid property embraced in the estate of John Thomas unless and until Emma J. Luton can sustain the Burden of Proof and show that Joseph Thomas was in existence at the time of John Thomas's death.

c) Grant to plaintiff such other and further relief as may be just and proper.

Leon BenEzra
810 18th Street, N.W.
Washington, D. C.

Ralph Currin
Pendleton, Oregon

ATTORNEYS FOR PLAINTIFF

EXHIBIT 1

[FILED APR 3—1958 HARRY M. HULL, Clrk]

PROBATE	UNITED STATES
16742-41;	DEPARTMENT OF THE INTERIOR
422-47;	OFFICE OF THE EXAMINER OF
16056-52;	INHERITANCE
7324-54;	PORTLAND, OREGON
12282-54;	
E-149-56	

RJM

EXAMINER'S NOTICE TO HEIRS

TO:

Indian Office, Washington, D. C.,
Umatilla Indian Agency, Pendleton, Oregon,
Designated Accounting Office, BIA, Box 4097, Portland 8,
Oregon,

Mrs. Emma J. Luton, Route 1, Pendleton, Oregon,
Mr. Joe Hayes, Box 181, Route 1, Pendleton, Oregon,
Mr. Ralph Currin, Attorney at Law, Pendleton, Oregon,
Mr. Kelly Hancock, Attorney at Law, Omak, Washington,
Mrs. Ellen Edwards St. Paul, Box 674, Grand Coulee,
Washington,
Mr. William Wells, Attorney at Law, Pendleton, Oregon,
Mr. W. C. Perry, Attorney at Law, Pendleton, Oregon,
Jwayne & McNichols, Attorneys at Law, Burns Building,
Orofino, Idaho,
Mr. Peter Lloyd, % Indian Agency, Pendleton, Oregon,
Mrs. Sallie Walker Joye, Rt. 1, Orofino, Idaho,
Mrs. Lena James, Desmet, Idaho,
Mr. Stanford James, % Mrs. Sallie Walker Joye, Rt. 1,
Orofino, Idaho,
Mr. Robert James, do
Mr. David James, do

8 A

You are hereby notified that on June 20, 1956, the final order was made by the undersigned Examiner of Inheritance in the estate of John Thomas, deceased Cayuse Allottee No. 223. A copy of the order is attached to this notice.

This decision becomes final 60 days from the date of this notice. Interested persons who have legal ground for complaint may file a petition for rehearing, in triplicate, with the Superintendent stating all the facts on which they rely, within the 60 days, but not thereafter. The petition must be under oath and must be accompanied by the affidavit of at least one person who assumes to know the facts. The Superintendent shall immediately forward the petition for rehearing to the Examiner of Inheritance.

Distribution of the estate and payment of claims are made by Superintendent William Ensor, Umatilla Indian Agency, Pendleton, Oregon. For information thereon, consult the Superintendent.

PROBATE FEE TO BE COLLECTED: \$75.00

Sincerely,
R. J. MONTGOMERY,
Examiner of Inheritance.

Dated and mailed: June 20, 1956.

PROBATE UNITED STATES
16742-41; DEPARTMENT OF INTERIOR
422-47; OFFICE OF THE EXAMINER OF
16056-52; INHERITANCE
7324-54; PORTLAND, OREGON
12282-54;
E-149-56

RJM

ORDER APPROVING WILL AND DETERMINING
HEIR OF SUBSEQUENTLY DECEASED DEVISEE

IN THE MATTER OF THE ESTATE OF:
John Thomas, Cayuse No. 223 of
the Umatilla Indian Agency,
Pendleton, Oregon.

This case coming on to be heard before the Probate Division, Office of the Solicitor, Portland, Oregon, and on submission of the evidence, the following facts and conclusions of law are presented:

A hearing was duly held and concluded at Toppenish, Washington, on July 19, 1955, at 1 PM, for the purpose of ascertaining the heirs at law of said decedent and the facts and circumstances surrounding the execution of an instrument in writing, dated October 13, 1923, purporting to be the decedent's last will and testament. Hearings were held previously in this matter by Special Examiner Bokker under date of November 18, 1940, and by former Examiner Bruce under date of December 10, 1947, and by this office under date of April 29, 1953. Some testimony was taken by former Superintendent Roe Cloud under date of October 21, 1940. All testimony taken is on file with the Commissioner of Indian Affairs.

Simultaneously with the above hearings, the matter of the estate of Joseph Thomas, Umatilla No. 877, son of the instant decedent, was also considered. Joseph Thomas disappeared under date of August 3, 1939.

Under date of September 23, 1941, the Secretary of the Interior issued an Order disposing of certain claims that were filed against the estate of John Thomas, the instant decedent. The matter of determining the heirs of John Thomas was held in abeyance of the settlement of the estate of Joseph Thomas.

A decree has been issued this date in the estate of Joseph Thomas, presuming him to have died on August 3, 1946, at the age of 35 years, which was 7 years from the time of his disappearance. The reasons for this are fully set forth in the Order in that case.

Mr. Joe Hayes, a cousin of John Thomas, was represented in this matter by Mr. Ralph Currin, Attorney at Law, Pendleton, Oregon. Counsel for Mr. Hayes contends that Joseph Thomas, son of the decedent, should be declared legally dead as of the time of his disappearance in 1939, which would be prior to the date of death of John Thomas, the instant decedent. Counsel has filed briefs which are included with the record.

Mrs. Ellen Edwards St. Paul contends that she is a daughter of the decedent, John Thomas, and was represented in this matter by Mr. Kelly Hancock, Attorney at Law, Omak, Washington. Counsel has filed a letter, likened to a brief, which is included with the record.

The evidence adduced at the hearings discloses that the decedent died on September 22, 1940, at the age of 52 years, a resident of Oregon, and was unmarried at the time of his death.

It is not believed that the evidence substantiates the fact that Mrs. Ellen Edwards St. Paul is a daughter of the decedent, John Thomas.

Therefore, if the decedent had died intestate, his sole heir would have been his son, Joseph Thomas, mentioned above.

By the terms of decedent's purported will, dated October 13, 1923, he devises his entire estate to his son, Joseph Thomas, with the exception of certain unrestricted personal property which is bequeathed to Glenn Bushee, a Non-Indian.

The evidence shows that at the time of death of Joseph Thomas, as presumed, on August 3, 1946, he left, as his sole heir, a halfbrother, Samuel J. Luton, entitled to his entire estate. The evidence further shows that Samuel J. Luton died intestate on December 18, 1954, leaving surviving as his only heir, his wife, Emma J. Luton, living now. (Probate 10549-55).

The lands included in this estate are not subject to the Act of June 18, 1934 (48 Stat. 984; 25 USC Sec. 464).

The will appears to meet all legal requirements and is on file with the County Court of Umatilla County, Oregon, where the same was admitted to probate and proven, on December 17, 1946. A certified copy of same is included with this record. It appears to be a proper instrument to receive Departmental approval.

NOW, THEREFORE, by virtue of the power and authority vested in the Secretary of the Interior by the Act of June 25, 1910 (36 Stat. 855-56; 25 USC Sec. 372) as amended by the Act of February 14, 1913 (37 Stat. 678; 25 USC Sec. 373) and pursuant to Departmental Regulations of May 29, 1947 (25 CFR 81), the above mentioned written instrument, dated October 13, 1923, is hereby approved as the last will and testament of the decedent above named, and I hereby find, adjudge and declare that at the date of the above mentioned hearing, the sole heir of the subsequently deceased beneficiary,

Joseph Thomas, determined in accordance with the laws of Oregon, was:

Emma J. Luton, Cayuse 760

Wife and sole heir of
subsequently deceased half-
brother (Samuel J. Luton)

All.

The Superintendent or other officer in charge of the Umatilla Indian Agency, Pendleton, Oregon, will cause distribution of the trust estate to be made in accordance with the terms of said will and this Order, subject to the payment of the probate fee, as follows:

To Emma J. Luton: Decedent's entire trust estate.

The personal property bequeathed to Glenn Bushee, Non-Indian, is not trust property and is therefore, not under the jurisdiction of the Interior Department. Such unrestricted personal property should be turned over to the proper representative of the decedent as appointed by the proper court of the State of Oregon; if such property is still in the hands of the Umatilla Indian Agency Superintendent.

The estate of said decedent subject to the jurisdiction of this Department having been appraised at \$63,811.09, a fee of \$75.00 will be collected by the Superintendent or other officer in charge of the Umatilla Indian Agency, Oregon, pursuant to authority found in the Act of January 24, 1923 (42 Stat. L., 1185).

Done at the City of Portland, Oregon, and dated this 20th day of June, 1956.

(Sgd.) R. J. MONTGOMERY
Examiner of Inheritance.

EXHIBIT 2

[Filed April 3, 1958 Harry M. Hull, Clerk]

**ESTATE OF JOHN THOMAS
DECEASED CAYUSE ALLOTTEE NO. 223**

AND

**ESTATE OF JOSEPH THOMAS,
DECEASED UMATILLA ALLOTTEE NO. 877**

IA-848 *Decided November 6, 1957*

**Indian Lands: Descent and Distribution: Presumption
of Death**

An Examiner of Inheritance may hear and determine the issue of whether an Indian, by reason of his unexplained absence, is to be presumed dead. (25 CFR 81.20) At common law and under the statutes of Oregon, a person is presumed to be dead after an unexplained absence of 7 years.

**Indian Lands: Descent and Distribution: Presumption of
Death**

To determine death to have occurred at an earlier date than seven years, evidence must show facts or circumstances which would establish that it was an earlier date. If a precise period as to time of death must be established, it must be done so by evidence of such character as to make it probable that he died at the particular time.

**Indian Lands: Descent and Distribution: Intestate Suc-
cession**

The doctrine of ancestral descent is not applicable to an adult Indian estate under Oregon statutory laws.

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Solicitor
Washington 25, D. C.

IA-848

November 6, 1957

Probate No. 16056-52
and
Probate No. 9599-56

Petition for rehearing denied Affirmed

Estate of John Thomas, deceased Cayuse Allottee No. 223:
and
Estate of Joseph Thomas, deceased
Umatilla Allottee No. 877

APPEAL FROM AN EXAMINER OF INHERITANCE
BUREAU OF INDIAN AFFAIRS

Mr. Joe Hayes, through his attorneys, Ralph Currin, and Koerner, Young, McCollock and Dezendorf, has appealed to the Secretary of the Interior from a decision of an Examiner of Inheritance dated August 22, 1956, denying his petition for rehearing in the joint matter of the Estates of John Thomas, deceased Cayuse Allottee No. 223 and Joseph Thomas, deceased Umatilla Allottee No. 877.

John Thomas, the father of Joseph Thomas died testate on September 22, 1940, at the age of 52, a resident of Oregon, leaving a restricted estate valued at \$63,811.09. Joseph Thomas, a resident of Oregon, who disappeared on August 3, 1939, was by decree issued by the Examiner of Inheritance on June 20, 1956, presumed

to have died intestate on August 3, 1946, at the age of 35 years, being seven years from the time of his disappearance, leaving a restricted estate valued at \$6,259.53. Orders by the Examiner of Inheritance in these estates, both dated June 20, 1956, approved the will of John Thomas dated October 13, 1923, which devised his entire estate, with the exception of some unrestricted personal property, to his son, Joseph Thomas, and determined that Joseph Thomas was survived by his maternal half brother, Samuel J. Luton, who was found to be entitled to the entire estate of Joseph Thomas and further found that Samuel J. Luton died December 18, 1954, intestate, leaving as his only heir at law, his wife, Emma J. Luton. By these findings, both estates vested in Emma J. Luton. Mr. Joe Hayes, a first cousin of the decedent John Thomas, represented by Attorney Ralph Currin, contended that Joseph Thomas should be declared legally dead as of the time of his disappearance in 1939, which would be prior to the death of his father John Thomas, whereupon Joe Hayes would inherit the estate of his cousin John Thomas.

The facts pertaining to the disappearance of Joseph Thomas appear to be that, in 1939 at the age of 28 he was employed at a CCC camp in Warm Springs, Oregon, and that on or about August 3, 1939, accompanied by a friend Tony Benson, he went to Portland, Oregon; that Joseph left his friend to buy a shirt stating that he would return and meet his friend at a definite place, near where they would find a room. He failed to return and has not been heard of since. His friend searched for him and made inquiry of the police. He is said to have had an inclination to quarrel and fight when stimulated by drink. He did not appear to have any cause or reason for disappearing, being in no trouble of any kind, and it appears that he intended to return with his friend to the CCC camp at Warm Springs. He has not communicated with the Agency requesting lease mon-

ey, as he had always done regularly before his disappearance. A diligent search and inquiry failed to produce any information relative to his whereabouts.

In his petition for rehearing and notice of appeal, appellant Joe Hayes contends that the laws of the State of Oregon are applicable in determining dates of death, heirship, and all matters relating thereto and that a party not heard from for seven years is presumed dead (O.R.S. 41.360(26)); that the presumption of death applies only to the fact of death and not to the time of death; and that the date of death may be established by circumstantial evidence. Appellant urges that the only evidence relevant to the date of death shows without contradiction that Joseph Thomas died at the date of his disappearance and that there is no evidence in the record justifying the finding that Joseph Thomas died on August 3, 1946.

In the alternative petitioner urges that should the Examiner of Inheritance adhere to his prior ruling that Joseph Thomas died on August 3, 1946, Joe Hayes, nevertheless, is the sole heir of Joseph Thomas, basing that contention upon the ancestral property theory, whereby, in the case of real property which came to an intestate by descent, devise or gift from an ancestor, all those relatives of the half blood who are not of the blood of the ancestor are excluded. He contends that although the provision as to brothers and sisters contained in the statute (O.R.S. 11.020(4)) generally applies to half bloods unless the contrary intent appears, Oregon does follow the ancestral property theory by statute in the case of minors, O.R.S. 11.020(5). *Cordon v. Gregg*, 164 Ore. 306, 97 P. 2d 723, 101 P. 2d 414.

In his order denying the petition for rehearing, the Examiner made findings that, on the basis of previous determinations by the Department and court decisions

reported in such cases¹ and from the record established in this matter, the disappearance was the cause of death rather than that death was the cause of the disappearance, and that under Oregon statutes, Joseph Thomas could not have been declared legally dead before the expiration of seven years unexplained absence. The Examiner rejected the petitioner's contention as to the applicability of O.R.S. 11.020(5) by holding that it applies only to estates of minor decedents.

25 CFR 81.20 provides that an Examiner of Inheritance may hear and determine the issue of whether an Indian, by reason of his unexplained absence, is to be presumed to be dead. The Department in its determination of this issue has adopted the laws of the State of domicile of the decedent.² The applicable Oregon statute (O.R.S. 41.360(26)) provides that a party not heard from for seven years is presumed dead. It is established law that the presumption of death applies only to the fact of death and not to the time of death, and that there is no presumption that death occurred at any particular time during the seven year period of absence, and that the date of death, like other facts, may be established by circumstantial evidence. We cannot agree with the contention of appellant that it is the general rule that mere disappearance, when surrounding circumstances show no motive for such disappearance is sufficient to justify a finding of death at or near the date of disappearance. It may appear in evidence that circumstances existed or events have occurred by which

¹ *Davie v. Briggs*, (Oct. 1878) 97 U.S. 628; *Butler v. Sup. Ct. Independent Order of Foresters*, 53 Wash. 118, 101 Pac. 481, *Crazy Baby*, Cheyenne No. 2952 (Probate 66430-19); *Theodore Headman*, Ponca Unallotted (Probate 34188-35).

² *Estate of Jack (Jacque) Naylor*, Yakima Allottee No. 4523. Probate No. 20100-50 (IA-623), also *Estate of Columbus Tulee*, Yakima Allottee No. 2860 Probate No. 22837-44.

it may be inferred that the date of death was at about the time of disappearance or some other time during the seven year period, but a mere disappearance without motive will not in itself accelerate the date of death prior to the termination of the seven year period. In *Davie v. Briggs, supra*, the court said:

"If it appears in evidence that the absent person, within the seven years, encountered some specific peril, or within that period came within the range of some impending or immediate danger, which might reasonably be expected to destroy life, the Court or jury may infer the life ceased before the expiration of the seven years."

In the same case the court cited Taylor's Treatise on the Law of Evidence (Sec. 157) that

" * * * although a person who had not been heard of for seven years is presumed to be dead, the law raises no presumption as to the time of his death; and, therefore, if any one has to establish the precise period during those 7 years at which such person died, he must do so by evidence, and can neither rely, on the one hand, on the presumption of death, nor on the other, upon the presumption of the continuance of life."

In *Mutual Life Insurance Company of New York v. Zimmerman*, 75 F. 2d 758, the court said:

"If death must be established at a definite date before expiration of the seven years, something besides the presumption is necessary."

The circumstances attending the disappearance of Joseph Thomas are that he was expected to return to meet this friend; that he was expected to return to the CCC camp at Warm Springs; that he left to buy a shirt; that he had a tendency to become quarrelsome and fight when induced by strong drink; and that he did not continue to request from the Agency his rent money which has been accumulating from the time of his disappear-

ance. We do not believe that these circumstances necessarily indicate any peril or danger. Nor is the fact that he was expected to return a justification for the presumption that he met death at any particular time. The fact, however, that he did not request, as was his usual habit, the funds available to him from that Agency, is admittedly a circumstance tending to show that death may have occurred at some time prior to the end of the seven year period, but certainly that single circumstance does not establish a date with any certainty. In the absence of evidence justifying the fixing of an approximate date when death most likely occurred, it can only be determined that he died on some day within the seven year period and that at the end of the seven year period he is presumed to be dead. Otherwise stated, he is presumed to be dead from and after the seven year period.

The great weight of authority is to the effect that the fixing of a time of death earlier than the seven years is a question of fact to be determined by a jury, and that such a determination is proper without evidence of specific peril or immediate danger in the case of a party known to be sober, industrious, with strong domestic attachments and great affection for his family, and with fine regular habits who journeys from his home and is never again heard of. *Tisdale v. The Connecticut Mutual Life Insurance Company*, 26 Iowa 170; *Butler v. Supreme Court Independent Order of Foresters*, *supra*. Such is not the case in the life of Joseph Thomas since none of these qualities appear to fit with his habits or way of life. The only circumstance surrounding his disappearance which might be said to indicate that death could possibly have occurred sometime during the seven years, is his failure to request rent money due him. But the record does not contain evidence fixing the time when request for funds was last made or when requests *may*

it may be inferred that the date of death was at about the time of disappearance or some other time during the seven year period, but a mere disappearance without motive will not in itself accelerate the date of death prior to the termination of the seven year period. In *Davie v. Briggs, supra*, the court said:

"If it appears in evidence that the absent person, within the seven years, encountered some specific peril, or within that period came within the range of some impending or immediate danger, which might reasonably be expected to destroy life, the Court or jury may infer the life ceased before the expiration of the seven years."

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" * * * although a person who had not been heard of for seven years is presumed to be dead, the law raises no presumption as to the time of his death; and, therefore, if any one has to establish the precise period during those 7 years at which such person died, he must do so by evidence, and can neither rely, on the one hand, on the presumption of death, nor on the other, upon the presumption of the continuance of life."

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ance. We do not believe that these circumstances necessarily indicate any peril or danger. Nor is the fact that he was expected to return a justification for the presumption that he met death at any particular time. The fact, however, that he did not request, as was his usual habit, the funds available to him from that Agency, is admittedly a circumstance tending to show that death may have occurred at some time prior to the end of the seven year period, but certainly that single circumstance does not establish a date with any certainty. In the absence of evidence justifying the fixing of an approximate date when death most likely occurred, it can only be determined that he died on some day within the seven year period and that at the end of the seven year period he is presumed to be dead. Otherwise stated, he is presumed to be dead from and after the seven year period.

The great weight of authority is to the effect that the fixing of a time of death earlier than the seven years is a question of fact to be determined by a jury, and that such a determination is proper without evidence of specific peril or immediate danger in the case of a party known to be sober, industrious, with strong domestic attachments and great affection for his family, and with fine regular habits who journeys from his home and is never again heard of. *Tisdale v. The Connecticut Mutual Life Insurance Company*, 26 Iowa 170; *Butler v. Supreme Court Independent Order of Foresters*, *supra*. Such is not the case in the life of Joseph Thomas since none of these qualities appear to fit with his habits or way of life. The only circumstance surrounding his disappearance which might be said to indicate that death could possibly have occurred sometime during the seven years, is his failure to request rent money due him. But the record does not contain evidence fixing the time when request for funds was last made or when requests *may*

have been made. Such evidence, to affect or control inheritance, must be such as to show that death occurred at the time of his disappearance or before September 22, 1940, the date of his father's death, which is not borne out by the record. We believe that the determination by the Examiner of Inheritance that Joseph Thomas was presumed to be dead on August 3, 1946, was proper under the law and the evidence in this matter.

We also agree with the finding of the Examiner as to the further contention of appellant in the alternative that under section 5 of 111.020 O.R.S., Samuel J. Luton, not being of the blood of the ancestor (John Thomas) from whom the property came to the decedent (Joseph Thomas) would not inherit the property. The statute is applicable only to estates of minors and can be given no consideration in this matter.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (Sec. 25, Order No. 2509, as revised, 17 F.R. 6793), the Order of the Examiner of Inheritance denying the petition for rehearing is affirmed and the appeal is dismissed.

The Superintendent of the Umatilla Indian Agency, Pendleton, Oregon, is directed to distribute the decedents' estates in accordance with the Examiner's Orders dated June 20, 1956.

/s/ EDMUND T. FRITZ
Acting Solicitor

Filed May 29, 1958 Harry M. Hull, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 859-58

JOE HAYES, Plaintiff,

v.

FRED A. SEATON,
SECRETARY OF THE INTERIOR,
Defendant.

ANSWER

First Defense

This Court is without jurisdiction over the subject matter of this action.

Second Defense

The complaint fails to state a claim upon which relief can be granted.

Third Defense

1. The defendant admits that the amount in controversy, exclusive of interest and costs, exceeds the sum of \$3,000.00 and denies each and every other allegation in paragraph 1 of the complaint.

2. The defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation that the plaintiff is a domiciled resident citizen of the United States and the State of Oregon and admits all other allegations contained in paragraph 2 of the complaint.

3. The defendant admits the allegations of paragraph 3 of the complaint.

4. The defendant admits the allegations of paragraph 4 of the complaint. The defendant further alleges that the estate of John Thomas was comprised of both lands held in trust by the United States and funds which were subject to the same trust.

5. The defendant admits the allegations of paragraph 5 of the complaint.

6. The defendant admits the allegations of paragraph 6 of the complaint. The defendant further alleges that the will of John Thomas was approved pursuant to authority contained in the Act of June 25, 1910, 36 Stat. 855, as amended by the Act of February 14, 1913, 37 Stat. 678, 25 U.S.C., secs. 372, 373, and the regulations of the Secretary of the Interior, 25 C.F.R. (1949 Ed.) part 81. A copy of the will of John Thomas is attached hereto as exhibit A. The heirs of Joseph Thomas and Samuel J. Luton were determined pursuant to authority contained in the Act of June 25, 1910, 36 Stat. 855, and the regulations of the Secretary of the Interior, 25 C.F.R. (1949 Ed.) part 81. A copy of the order of presumption of death and determining the heirs of Joseph Thomas is attached hereto as exhibit B. A copy of the order of August 22, 1956, denying petition for rehearing is attached hereto as exhibit C.

7. The defendant admits the allegations of paragraph 7 of the complaint.

8. The defendant admits the allegations of paragraph 8 of the complaint.

9. The defendant denies the allegations of paragraph 9 of the complaint.

WHEREFORE, the defendant demands judgment dismissing this action with costs.

/s/ FLOYD L. FRANCE
Floyd L. France
Attorney, Department of Justice
Washington, D. C.

Attorney for the Defendant

I hereby certify that on the 29th day of May, 1958, I mailed a copy of the foregoing Answer to Leon Ben Ezra, Esquire, 810 18th St., N. W., Washington, D. C., in a properly addressed, postage-free envelope.

/s/ FLOYD L. FRANCE
Floyd L. France
Attorney

EXHIBIT A

Filed May 29, 1958 Harry M. Hull, Clerk

KNOW ALL MEN BY THESE PRESENTS: That I John Thomas of Pendleton, Oregon do hereby make and declare the following to be my last will and testament, that is to say.

1.

I hereby appoint Glenn Bushee of Pendleton, Oregon as executor of my estate and direct that no bond or undertaking of any character be required of him as such executor.

2.

I hereby give, devise and bequeath to Glen Bushee of Pendleton, Oregon my entire outfit of Indian trappings and apparel consisting in part of two small war bonnets, one large war bonnet, two large beaded belts, two pair moccasins, two pair leggings, two beaded britch clots and all other similar articles belonging to me at the time of my death or in which I have any interest.

3.

I hereby give, devise and bequeath all other property of any nature belonging to me or in which I have any interest to my son Joe Thomas.

IN WITNESS WHEREOF I have hereunto set my hand at Pendleton, Oregon this 13th day of October, 1923 in the presence of J. R. Raley and Frederick Steiwer whom I have asked to be witnesses to this my last will and testament.

in the presence of
J. R. Raley
Frederick Steiwer

John Thomas

STATE OF OREGON)
UMATILLA COUNTY) ss

THIS CERTIFIES that on this 13th day of October, 1923 the foregoing instrument was signed, sealed, published and declared by John Thomas to be his Last Will and Testament in the presence of us and each of us who at his request and in his presence and in the presence of each other did sign our names thereto as witnesses.

J. R. Raley
Residing at Pendleton, Oregon

Frederick Steiwer
Residing at Pendleton, Oregon

CERTIFIED, a true copy of
the original.

/s/ R. J. MONTGOMERY
Examiner of Inheritance

PROBATE

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE EXAMINER OF INHERITANCE

Pursuant to the provisions of the Act of February 14, 1913 (37 Stat. 678), and the provisions of 25 CFR 81, the within will is hereby APPROVED in accordance with the Order of even date herewith.

Done at the City of Portland, Oregon, and dated JUN 20 1956.

/s/ R. J. MONTGOMERY
Examiner of Inheritance

EXHIBIT B

Filed May 29, 1958 Harry M. Hull, Clerk

PROBATE	UNITED STATES
46742-41;	DEPARTMENT OF THE INTERIOR
422-47;	OFFICE OF THE EXAMINER OF
16056-52;	INHERITANCE
7324-54;	PORTLAND, OREGON
12282-54;	
E-148-56.	
RJM	

IN THE MATTER OF THE ESTATE OF:

Joseph Thomas, Umatilla Allottee
No. 877 of the Umatilla Indian
Agency, Pendleton, Oregon

**ORDER OF PRESUMPTION OF DEATH AND
DETERMINING HEIRS**

The following findings are made, and the following order is entered, in the exercise of the authority vested in the Secretary of the Interior by Section 1 of the Act of June 25, 1910 (36 Stat. L., 855; 25 USC Sec. 372), as amended by the Act of February 14, 1913 (37 Stat. 678; 25 USC Sec. 373) and Probate Regulations of the Interior Department (25 CFR 81).

1. Findings

(a) Joseph Thomas, Umatilla Allottee No. 877, disappeared from Portland, Oregon, on August 3, 1939.

(b) The evidence taken at hearings duly concluded at Toppenish, Washington, on July 19, 1955, indicates that diligent search has been made for the above named person by interested and other parties without avail. The records show that the party had little regard for his relatives and had no local attachments of any kind

and was in the habit of leaving home for considerable periods of time without notifying anyone of his whereabouts. Further, there is no evidence of any catastrophe involved in which Joseph Thomas may have perished at the time of his disappearance.

II. Order

(a) Joseph Thomas is hereby presumed to have died intestate, and the date of his death is determined to have been on August 3, 1946, at the age of 35 years.

(b) I hereby find, adjudge and declare that at the date of the above mentioned hearing, the heir of Joseph Thomas, determined in accordance with the laws of succession of Oregon, and her share in the estate was:

Emma J. Luton, Cayuse 760	Wife and sole heir of
	subsequently deceased
	halfbrother (Samuel
	J. Luton) All.

The claim of Anna Wannassay, Route 1, Pendleton, Oregon, for care alleged to have been given to the decedent for 5 months some 30 years ago is hereby disapproved. Claimant does not state an amount and testified that she did not intend to charge the decedent for these services at the time such services were being given.

The case of John Thomas, Cayuse Allottee No. 223, father of this decedent, is being completed simultaneously with the instant case.

Mr. Ralph Currin, Attorney at Law, Pendleton, Oregon, represented Mr. Joe Hayes of Pendleton, Oregon, a first cousin of John Thomas, in that case, as well as the instant case of Joseph Thomas. Mr. Currin has submitted a brief in these matters which is included in the file of John Thomas.

The estate of said decedent subject to the jurisdiction of this Department having been appraised at \$6,259.53, a fee of \$65.00 will be collected by the Superintendent or other officer in charge of the Umatilla Indian Agency, Pendleton, Oregon, pursuant to authority found in the Act of January 24, 1923 (42 Stat. L., 1185; 25 USC Sec. 377).

Done at the City of Portland, Oregon, and dated this 20th day of June, 1956.

/s/ R. J. MONTGOMERY
Examiner of Inheritance.

EXHIBIT C

Filed May 29, 198

PROBATE UNITED STATES
9598-56; DEPARTMENT OF THE INTERIOR
9599-56. OFFICE OF THE EXAMINER OF
RJM INHERITANCE
 PORTLAND 8, Oregon.

IN THE MATTER OF THE ESTATES OF:

John Thomas, Cayuse No. 223, and
Joseph Thomas, Umatilla No. 877,
of the Umatilla Indian Agency,
Pendleton, Oregon.

ORDER DENYING PETITION FOR REHEARING

Orders probating the above estates were issued by this office under date of June 20, 1956. Joseph Thomas was presumed to have died intestate on August 3, 1946, at the age of 35 years. John Thomas died September 22, 1940, leaving a will, devising his entire estate, with the exception of some unrestricted personal property, to his son, Joseph Thomas.

Joseph Thomas was found to have been survived by his halfbrother, by the same mother, Samuel J. Luton, who was found to be entitled to his entire estate. Samuel J. Luton died December 18, 1954, leaving as his only heir at law, his wife, Emma J. Luton.

Thus both of the above mentioned estates of John and Joseph Thomas vested in the said Emma J. Luton.

A petition for rehearing in the above estates, dated August 17, 1956, was filed by the firm of Currin, Koerner, Young, McColloch & Dezendorf, Attorneys at Law, Pendleton, Oregon, on behalf of Joe Hayes, a first cousin of John Thomas. According to the receiving

stamp of the Umatilla Indian Agency, Pendleton, Oregon, the petition was filed within the time allowed by the Probate Regulations of the Interior Department.

The petition is not accompanied by the affidavit of another person who assumed to know the facts, as required by the Examiner's Notice to Heirs, attached to the order issued on June 20, 1956. However, this does not appear to be entirely material in this matter, as the petition is based upon the construction of law.

Petitioner contends that Joseph Thomas, having disappeared in 1939, should have been declared legally dead in 1939 instead of 7 years later, in 1946. Counsel cite various cases in support of the contention of the petitioner.

If the contention of the petitioner is correct, then the estate of Joseph Thomas would vest in his father, John Thomas, and upon the death of John Thomas, his estate would vest in the legal representative or representatives of John Thomas, who appears to be the petitioner, Joe Hayes.

Section 41.360 (26) ORS states: "A party not heard from for 7 years is presumed dead".

From a perusal of all cases cited by the petitioner and other cases pertaining to presumption of death, all seem to add up to the following:

"Was the disappearance the cause of death or was death the cause of the disappearance".

The leading case in Oregon appears to be *Fink v. Prudential Insurance Co.* (1939) 162 Oregon 37, 90 P. 2nd. 762. In that case the court stated:

"Death will not be presumed from absence and lack of tidings which can be explained without belief of death."

In the case of *Davie v. Briggs*, October 1878 (97 U. S. Reports 628), which appears to be about the only supreme court case touching on the subject, the court stated:

" * * * death may have occurred within the seven years, like encountering some specific peril, but it is incumbent upon the party so claiming to prove the death occurred before the expiration of seven years" * * * .

While the Department does not adhere strictly to the burden of proof doctrine in our proceedings, yet, the record does not reveal any specific peril to the decedent.

In the case of *Butler v. Foresters*, 53 Washington 118, we believe the court gave a very intelligent discussion of the point involved in this matter, when it stated:

"It seems to be well settled that the presumption of death attaches when a party has been absent for seven years without tidings of his existence. There is some conflict in authority as to the time at which death is presumed to occur under such a presumption; but the great weight of authority is to the effect that that is a question of fact to be determined by the jury. In reaching a conclusion as to the time of death, much must necessarily depend upon the domestic attachment of the party. If it appears that the party had little regard for his family or friends, had no local attachments of any kind, was known to be on bad terms with his family or neglectful of it, or was in the habit of leaving his home for considerable periods of time without notifying his family or friends of his whereabouts, these circumstances would tend to diminish the presumption of death as the cause of the disappearance. But where the party is known to be sober and industrious, with strong domestic attachments, considerate, kind, and affectionate to his family, and generally regardful of the rights of others, and disappears suddenly from or leaves his home and the community in which he lives and where his interests are, without any explanation; these are circumstances so strong that, without more, the jury would be justified in

concluding that death was the cause of his disappearance. * * *".

In cases before the Interior Department where there was no peril to the party disappearing shown or where no catastrophe in which the party may have died, it has consistently been held that the party is presumed to have died at the expiration of 7 years unexplained absence. Some of the cases are, the following:

Crazy Baby, Cheyenne No. 2952 of the Cheyenne & Arapaho Agency, Oklahoma (Probate 66430-19). Crazy Baby disappeared in about 1899 and was declared legally dead in 1906.

Theodore Headman, Ponca Unallotted of the Pawnee Indian Agency, Oklahoma (Probate 34188-35). Theodore Headman disappeared on January 21, 1927, and was declared legally dead as of January 21, 1934.

In view of the foregoing and from the record established in this matter, it is believed that the disappearance was the cause of death, and under Oregon Statute, Joseph Thomas could not have been declared legally dead before the expiration of 7 years unexplained absence, and therefore, no error was committed in presuming him to have died in 1946.

Petitioner further contends that, if it is held that Joseph Thomas died in 1946, then Section 5 of 111.020 ORS, would apply in this matter. Petitioner contends that under this section of the Oregon Statute, Samuel J. Luton, not being of the blood of the ancestor (John Thomas) from whom the property came to the decedent (Joseph Thomas), could not inherit the property.

However, this section of the Oregon Statutes applies only to estates of minors. As Joseph Thomas was 35 years old at the time of his presumed death, this contention needs no further consideration.

The petition of Joe Hayes for rehearings in the es-

tates of John Thomas and Joseph Thomas is therefore, denied. In accordance with the Regulations of the Interior Department, petitioner has 60 days from this date in which to appeal from this decision to the Secretary of the Interior, if he so desires. A copy of the pertinent Regulations is attached.

By copies of this order, the Superintendent of the Umatilla Indian Agency is instructed to withhold distribution of these estates until further notice from this office.

Done at the City of Portland, Oregon, and dated this 22nd day of August, 1956.

/s/ R. J. MONTGOMERY
Examiner of Inheritance.

Copies to:

Indian Office, Washington, D. C. (2 copies each for John Thomas and Joseph Thomas files),
Umatilla Indian Agency, Pendleton, Oregon,
Colville Indian Agency, Nespelem, Washington,
Mr. Joe Hayes, Box 181, Route 1, Pendleton, Oregon,
Currin, Koerner, Young, McColloch & Dezendorf, Attorneys at Law, Pendleton, Oregon,
Mr. Kelly Hancock, Attorney at Law, Omak, Washington,
Mrs. Emma J. Luton, Route 1, Pendleton, Oregon,
Mrs. Ellen Edwards St. Paul, Box 674, Grand Coulee, Washington,
Swayne & McNichols, Attorneys at Law, Burns Building, Orofino, Idaho,
Mr. Peter Lloyd, C/o Indian Agency, Pendleton, Oregon,
Mrs. Sallie Walker Joye, Rt. 1, Orofino, Idaho,
Miss Lena James, Desmet, Idaho,
Mr. Stanford James, C/o Mrs. Sallie Walker Joye, Rt. 1, Orofino, Idaho,
Mr. Robert James, do
Mr. David James, do
Portland Area Office, BIA, Realty Division, Portland, Oregon.

Filed June 30, 1958 Harry M. Hull, Clerk
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 859-58

Joe Hayes, Plaintiff,

vs.

Fred A. Seaton, Secretary of the Interior, Defendant.

DEFENDANT'S MOTION FOR JUDGMENT ON
THE PLEADINGS OR FOR SUMMARY JUDGMENT

The defendant, Fred A. Seaton, moves this Court for a summary judgment dismissing the complaint in this action on the ground that there is no dispute as to any material fact and the defendant is entitled to judgment as a matter of law. The grounds for this motion are:

1. The complaint fails to state a claim upon which relief can be granted.

2. The Order of Presumption of Death and Determining Heirs of Joseph Thomas, a deceased Umatilla Indian, represents the proper exercise of a power conferred upon the Secretary of the Interior by Congress and in which his action is expressly made final and conclusive.

3. The Secretary of the Interior, or his authorized representative, in the absence of proof to the contrary, correctly presumed that Joseph Thomas survived his father, John Thomas.

/s/ FLOYD L. FRANCE
Floyd L. France
Room 2129
Department of Justice
Washington, D. C.
Attorney for Defendant

Filed August 12, 1958 Harry M. Hull, Clerk
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 859-58

JOE HAYES, Plaintiff

v.

FRED A. SEATON,
Secretary of the Interior
Defendant

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

By his attorney, plaintiff Joe Hayes respectfully moves the court as follows:

1. That pursuant to Rule 56 of the Federal Rules of Civil Procedure the Court enter a summary judgment in plaintiff's favor to the effect that he is entitled to inherit the estates of John Thomas, deceased Cayuse Allottee No. 223, and of Joseph Thomas, deceased Umattilla Allottee No. 877, on the grounds that there are no issues as to any material fact, and that the plaintiff is entitled to judgment as a matter of law, in the alternative:

2. If summary judgment is not rendered in plaintiff's favor upon the whole case for all of the relief asked by plaintiff, and a trial is necessary, that the court, upon the hearing of this motion, by examining the pleadings and the evidence before it, and by interrogating counsel, ascertain what material facts exist without controversy and what material facts are actually and in good faith controverted, and thereupon make an order specifying the facts that appear without substantial controversy and directing such further proceedings in this action as are just.

This motion is based upon:

1. The pleadings in file in this action, together with their exhibits.
2. Plaintiff's interrogatories to defendant filed June 16, 1958 and defendant's answers thereto filed June 30, 1958.
3. Certified copies of documents selected from the file records in the estates of John and Joseph Thomas, which documents are attached to plaintiff's Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment, and denominated Exhibits A-1 through A-17.

Respectfully submitted,

Leon BenEzra
810 18th Street, N.W.
Washington, D. C.
Attorney for Plaintiff

Dated: _____

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EXHIBIT A-1

Filed August 12, 1958 Harry M. Hull, Clerk

UNITED STATES	Probate
DEPARTMENT OF THE INTERIOR	46742-41
Bureau of Indian Affairs	422-47
Office of the Examiner of Inheritance	16056-52
Portland 18, Oregon	

May 6, 1954

Commissioner of Indian Affairs,
Washington 25, D. C.

Dear Sir:

Reference is made to the estate of John Thomas, deceased Umatilla allottee No. C-223, in which final action is dependent upon whether the allottee's son, Joseph Thomas, a missing person, is living or deceased.

A hearing was first held in this matter by former Examiner Joseph Coursey on November 18, 1940. On the record then submitted, the Assistant Secretary declined to issue an order determining heirs, pending further investigation of the possibility of death of Joseph Thomas, but claims then filed were adjudicated.

Further hearings were held at the Umatilla Indian Agency on December 10, 1947, and April 29, 1953. The witnesses who then appeared had no information concerning the whereabouts of Joseph Thomas, and could only repeat their recollections of the circumstances of his disappearance. On January 31, 1951, a brief statement was taken from Tony Benson at his home on the Yakima Reservation.

The circumstances as they are known are summarized in the Acting Commissioner's letter of September 17, 1941, submitting the record to the Secretary.

The circumstances, so far as they are known, are concisely summarized in the record before the Office, but for convenience they will be stated briefly again. Joseph Thomas was employed at a C.C.C. camp on the Warm Springs Reservation, Oregon, in the fall of 1939. He went to Portland for a visit, in company with several other young men similarly employed, apparently intending to return to his work. He became separated from his companions shortly after arriving in Portland and has not since been seen, nor has any communication been received from him.

The statement of Tony Benson, who was well acquainted with the absentee's habits and disposition, furnishes ground for speculating that Joseph Thomas may have met with foul play as the result of his inclination to quarrel and fight when stimulated by drink.

It does not appear that the absentee had any cause or reason for disappearing. He was not in trouble or difficulty of any kind. Although of a wandering nature, it appears he fully intended to return with his companions to the CCC camp at Warm Springs. He has not communicated with the Agency requesting lease money as he had always done regularly before his disappearance. Diligent search and inquiry has failed to produce any information relative to the absentee's whereabouts.

The Oregon Code of Civil Procedure, Sec. 2-407, lists a total of 41 presumptions, denominated disputable presumptions, which may be controverted by other evidence. The twenty-sixth is quoted: "That a person not heard from in seven years is dead."

The Oregon Probate Code, 1940, sec. 19-1401 to 19-1410, sets forth the procedure for administration of estates of persons presumed to be dead. Provision is made for hearing, after notice by publication, and if the court is then satisfied that the legal presumption of death is made

out, it shall so decree, whereupon further notice by publication is required. If, within the time provided, evidence of the continuance in life of the presumed decedent is not forthcoming, letters of administration are issued. Distribution of the proceeds of the estate is made subject to the furnishing of an undertaking to refund the proceeds to the absentee should it develop that he is in fact alive and makes demand therefore within five years from the date of the order of distribution. If the person or persons entitled to the proceeds of the estate are unable to furnish bond, the money is to be placed at interest, for the five-year period, the interest to be paid annually to such persons.

Joseph Thomas has been absent for more than thirteen years. The facts are overwhelmingly such as to raise a legal presumption of death under the Oregon statute. It is recommended that the matter be placed before the Office of the Secretary for an appropriate order, based upon such presumption.

In connection with the John Thomas estate in which the record is pending before the office, at the hearing held by me at Umatilla Agency on December 10, 1947, a certified copy of an instrument purporting to be the last will and testament of John Thomas was presented by a Mr. J. R. Raley, Attorney at Law, of Pendleton, Oregon, which instrument is now before the office. The Examiner was advised informally by this attorney that his principal interest in the matter was on behalf of a white man, Glen Bushee, who is named in the will to receive certain ceremonial Indian trappings, such as war bonnets, beaded articles, etc. You will observe from copies of documents accompanying the alleged copy of the will that probate proceedings have been had in the County Court for Umatilla County, Oregon; the inventory covering only the items of personalty mentioned.

If the Department will proceed upon a presumption that Joseph Thomas died single and without issue at or about the time of his disappearance, on a date in the fall of 1939, then it would appear that at the time of the death of the testator, John Thomas, in September, 1940, he was a single man, without issue surviving, and the attempted devise of the residue of his property to his son, Joseph Thomas, lapses, and the estate passes as in the event of intestacy. What I believe should be done, therefore, is to proceed with the determination of the heirs of John Thomas without regard to the alleged will, and it is so recommended. It seems needless to give further consideration to the document since it is of no effect on the trust estate. Practical reasons exist for this course. In the first place, the original hearing in the John Thomas estate was held something over 12 years ago. The purported will was not offered until the supplemental hearing of December 10, 1947. Finally, the items of personalty which it purports to give to Glen Bushee, and which are included in the inventory of the estate probated in Umatilla County appear to have been the subject of considerable controversy at the Umatilla Agency several years ago when they were removed from the Superintendent's custody and apparently got into the hands of persons interested in the county court's proceedings. See former Superintendent Roe Cloud's letter of December 31, 1946, and subsequent exchange of correspondence under file 422-47. It has long been my opinion that we should, if possible, avoid entering into any controversy regarding such items of personal property in these estates. Too often the actual title to such items as ceremonial regalia is in doubt. We should allow the individuals concerned about the ownership of such personalty to settle their differences by mutual agreement, or if that proves impossible by appropriate action in the local courts. It is certainly not the kind of property over which the Department exercises any control or trust

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supervision during the lifetime of the owner, and is surrounded with vestiges of custom and ceremony to such a degree that for us to assert jurisdiction over it only leads to difficulty.

Enclosed with the record is all testimony taken by former Examiner D. H. Bruce and myself in these matters, as well as jurisdictional notices in both cases. Also enclosed is a report from the Superintendent of the Umatilla Indian Agency as requested in Chief Counsel's letter of April 15, 1954.

It will be noted that a report of a former hearing held in the estate of John Thomas is before the Office.

Respectfully,

R. J. Montgomery,
Examiner of Inheritance.

Encls.

EXHIBIT A-2

Filed August 12, 1958 Harry M. Hull, Clerk
 ESTATE OF JOHN THOMAS, Umatilla No. C-223.

Statement of Tony Benson, taken under oath, at his home,
 Route 1, White Swan, Washington, January 31, 1951.

Q. State your name, age, tribe and place of residence.

A. Tony Benson. Age 34. Yakima Tribe. White Swan,
 Wash., Rural Rte. 1.

Q. Were you acquainted, at one time, with a man named
 Joe Thomas, from the Umatilla Indian Reservation,
 who is said to have disappeared while in Portland,
 Oregon, a number of years ago?

A. Yes. I knew him quite well.

Q. For how long a time, and how well were you ac-
 quainted with him?

A. I knew him for about ten years before he disap-
 peared. We ran around together and were both
 working in a camp at Warm Spring when he dis-
 appeared.

Q. How old were you when you first knew him?

A. About 17 or 18—probably less than that, because it's
 been 9-10 years or more since he disappeared.

Q. Tell me all that you know about his disappearance.

A. We went in to Portland together. It was in the
 spring. Around the end of May I believe. We were
 both working in this E. C. camp at Warm Springs.
 I had a car. We decided to go into Portland for the
 week end. There were two other fellows rode in
 with us. I don't remember their names. We got into
 town and in a parking lot down town. Joe was wear-
 ing one of my shirts. He intended to go and get a
 shirt and I told him I would meet him between 4th
 and 5th on Alder because we were going to get a

room up in that part of town. From then on I never did see him. I left the car there until Sunday evening and in fact until about one o'clock Monday morning. I was looking for him around town there. Never found him.

Q. Did you make any inquiry at the police station, or elsewhere in Portland at that time?

A. Yes. We inquired at the Police station. They had no information regarding him.

Q. Did anyone else in town from the Warm Springs Reservation who knew Joe Thomas, know of his disappearance that time?

A. Yes. Eugene Stevens, from Montana, was in town at the same time, and he had a car and drove back to Warm Springs at the same time.

Q. Do you know whether any bodies have been recovered from the river in Portland which may have been identified as Joe Thomas?

A. No, but just two or three years ago I heard a body had been recovered about the time Joe disappeared, but that it was dressed differently from the way Joe was dressed at the time he left me. He was wearing white cordury trousers and a black shirt at the time.

Q. Was Joe in any trouble with the law or with anyone else at the time?

A. Not that I know of.

Q. Did he have a wife or children?

A. He used to talk about a wife that he had that died. She was supposed to have been from Idaho, I believe. He would talk about her when he would get about half lit up. She is supposed to have died before this happened.

Q. Do you mean by "lit up" that he became intoxicated occasionally?

A. Yes.

Q. Did he ever mention any children?

A. No, not that I know of.

Q. Was there any reason for him to disappear that you know of?

A. No.

Q. Do you believe he is dead?

A. Well, I don't know. I wouldn't believe he was dead until I saw that he was dead or knew of him recently dead.

Q. Can you tell me your impressions of him so far as his mental attitude was concerned. Did he appear to be satisfied with his work? Did he get along with the fellows he worked with?

A. Well, I think he seemed to be satisfied with his work all right, but he was sort of punch drunk. He had boxed quite a lot, and every time he would do any drinking he would want to pick a fight or a quarrel with someone.

Q. Was he drunk or sober at the time he left you in Portland that last time you saw him.

A. Sober then, but I sometimes wondered if he might have stopped in somewhere and had a few drinks and maybe got in a fight with someone.

Q. Is there any further statement that you care to make in connection with this matter, that you think might be of some assistance in closing the case, one way or another?

A. I don't know. They have been looking for him for a long time. If he was alive he would naturally write for the money that's been piling up at the Agency. If he was alive, he would naturally want money, and he would know where to get it.

Q. Have you ever heard of any body having seen him since the time you mentioned?

A. No.

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Q. And you, yourself have not seen him since then?

A. No.

Q. How old a man was he at the time?

A. He was up in his late 20's or possibly in his 30's.

Certified, a correct transcript of my notes of the testimony of Tony Benson, given under oath before me at his home, near White Swan, Washington, Jan. 31, 1951.

/s/ D. H. BRUCE
Examiner of Inheritance.

EXHIBIT A-3

Filed August 12, 1958 Harry M. Hull, Clerk

In reply Refer To:

UNITED STATES	Probate
DEPARTMENT OF THE INTERIOR	46742-41
Bureau of Indian Affairs	16056-52
Washington 25, D. C.	

December 15, 1952

Hon. Wayne Morse
United States Senate
Dear Senator Morse:

Receipt is acknowledged of your letter of December 6 inclosing one from Attorney William W. Wells of Pendleton, Oregon, concerning the estate of John Thomas, deceased Umatilla allottee No. C-223.

John Thomas died on September 22, 1940. In 1941, after notice and hearing, the Department entered an order holding that the record was not sufficiently certain to warrant a determination of heirs at that time, and directed the payment of certain claims against the estate.

Prior to the decedent's death, Joseph Thomas, his son and apparent sole heir, disappeared from the Warm Springs Reservation and has not been heard from since. If it should be found that Joseph Thomas predeceased his father, the sole heir to the John Thomas estate would be Joseph Hayes. However, if Joseph Thomas survived his father and is now dead, then the sole heir would be Joseph's maternal half-brother, Sam Luton.

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In October, 1940, about 100 copies of a missing notice containing a picture and description of Joseph Thomas were circularized among the police departments and law enforcement agencies, including penitentiaries, in the Northwest. No clue has been received as to his whereabouts. The record indicates that at the time of his disappearance Joseph Thomas was employed in the Civilian Conservation Corps, and we have asked the examiner of inheritance to obtain his fingerprints if they are available from that source. We will ask the Federal Bureau of Investigation to inform us whether their records indicate Joseph Thomas to be alive after the date of his disappearance.

Unfortunate past experience makes it necessary for us to proceed with caution in presumption of death cases, and without a clear showing that Joseph Thomas is dead we would be unwilling, on the record now before us, to enter an order presuming his death.

We are asking the examiner to forward a copy of Tony Benson's testimony to your correspondent.

Your enclosure is returned herewith.

Sincerely yours,

/s/ SELENE GIFFORD
Acting Commissioner.

Enclosure

Copy to Examiner Bruce w/copy of Attorney Wells' letter.

1. Forward copy of Tony Benson's testimony to Mr. Wells.
2. Forward to this office the fingerprints of Joseph Thomas if they are available.

RHLe liaert:hs 12-12-52

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EXHIBIT A-10

Filed August 12, 1958 Harry M. Hull, Clerk
UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION

*In Reply, Please Refer to
File No.*

Washington 25, D. C.

Date: June 28, 1954

To: Mr. Glenn L. Emmons
Commissioner
Bureau of Indian Affairs
Department of the Interior
Washington 25, D. C.

From: John Edgar Hoover, Director
Federal Bureau of Investigation

Subject: JOSEPH THOMAS
MISSING PERSON

I have received your letter dated June 22, 1954, wherein you have asked that we check for possible information concerning the whereabouts of one Joseph Thomas.

In an effort to be of assistance, a search was conducted in our Identification Division files for any current data regarding Mr. Thomas and as a result of this search, information was found on one Joseph Thomas born April 29, 1911, at Umatilla, Oregon. This individual, who may be the person in whom you are interested, was fingerprinted by the Yakima Indian Agency at Toppenish, Washington, and his fingerprint card was received from your department in July, 1939; however, I am sorry to advise that our files reflected no subsequent information regarding him.

Your letter is being returned at this time.

Enclosure

EXHIBIT A-11

Filed August 12, 1958 Harry M. Hull, Clerk
Estate of Joseph Thomas, Umatilla No. 877, a missing
person.

Samuel J. Luton, being first duly sworn, testifies as follows:

In do solemnly swear that the testimony I am about to give in the matter now pending, entitled the matter of the estate of the decedent, shown above will be the truth, the whole truth and nothing but the truth, so help me God.

/s/ SAMUEL J. LUTON

Subscribed and sworn to before me this 29th day of April, 1953.

/s/ R. J. MONTGOMERY
Examiner of Inheritance.

Q. What is your name, age, and residence?

A. Samuel J. Luton, born May 30, 1898, Route 1, Pendleton, Oregon.

Q. To what tribe to you belong?

A. Nez Perce and Cayuse.

Q. Did you know Joseph Thomas?

A. Yes.

Q. Were you related to him?

A. Yes, he was my half-brother.

Q. Did you have the same mother?

A. Yes, our mother was Alice Newton Luton, she died in 1917. (rec. 1918).

Q. Who was your father?

A. Tommy Types, he died in 1950.

Q. How many children did your mother have by your father?

A. I am the only one.

Q. Were your father and mother married?

A. Yes.

Q. Do you remember them living together?

A. No.

Q. Was it before or after you were born that they lived together?

A. I don't know.

Q. How many children did your mother have altogether?

A. I was the oldest.

Lettie Williams was next, she died. She had children but they all died small. Annie Mitchell was next, she died in 1922. She had no children. Then Joe Thomas, he is the one we are talking about today.

Q. Who was Lettie's father?

A. Joe Williams, he is dead.

Q. Who was Annie's father?

A. John Thomas.

Q. Who was Joe's father?

A. John Thomas.

Q. Was your mother married to these men?

A. Yes.

Q. Do you know whether Joe Thomas is living?

A. I don't know.

Q. When was the last time you saw him?

A. In 1939.

Q. You testified in this case before former Examiner Bruce in 1947, is that right?

A. Yes.

Q. Have you made any attempt to find Joe Thomas?

A. Yes, through the Superintendent at that time. He had circulars sent out to all the reservations.

Q. Was there any response to these circulars?

A. No.

Q. When did John Thomas die? Records show Sept. 22, 1940.

A. That is right.

Q. Where did you see Joe Thomas last?

A. Here in Pendleton.

Q. When was that?

A. In 1939.

Q. What month?

A. I don't remember.

Q. Was he ever seen by anyone that you know of after that?

A. No.

Q. You heard the testimony that he was last seen in a hotel in Portland in 1939?

A. I recall that.

Q. But you haven't seen him since 1939?

A. No.

Q. There is information in the record that he went to Warm Springs Reservation, did you ever go to Warm Springs to look for him?

A. No.

Q. Did you ever receive a letter from Joe Thomas after he left in 1939?

A. No.

Q. You never did hear from him?

A. No.

Q. His father, John Thomas, died after Joseph disappeared, is that right?

A. Yes.

Q. Have you ever heard anyone say they heard from Joe Thomas?

A. Not that I know of.

Q. Are you the only half-brother he had?

A. Yes.

Q. Any half-sisters?

A. No.

Q. Who is the nearest living relative of John Thomas?

A. Joe Hayes.

Q. Is there any evidence you can add to this case to show whether Joseph Thomas is living or dead?

A. I know of none.

I certify that this transcript is a correct and true recital of testimony as given by this witness, Samuel J. Luton.

/s/ B. M. OJIBWAY
Law Clerk.

EXHIBIT A-12

Filed August 12, 1958 Harry M. Hull, Clerk
Estate of John Thomas, Umatilla No. C-223.

I do solemnly swear that the testimony I am about to give in connection with the matter of the estate of the decedent named above, will be the truth, the whole truth and nothing but the truth, so help me God.
/s/ SAMUEL J. LUTON

Subscribed and sworn to before me at Umatilla Indian Agency, Pendleton, Oregon, December 10, 1947.

/s/ D. H. BRUCE
Examiner of Inheritance

- Q. State your name, age, tribe, and place of residence.
A. SAMUEL J. LUTON. 49. Cayuse Tribe and Nez Perce. Pendleton, Ore.
- Q. Is the testimony of the previous witness concerning your relationship to Joe Thomas correct?
A. Yes.
- Q. Do you know anything concerning the disappearance of Joe Thomas?
A. No, I don't.
- Q. Do you think he is living or dead?
A. I think he is still living.
- Q. Have you heard from him since he disappeared in 1939?
A. I had a letter from him in 1940.
- Q. Who was the letter from?
A. Joe Thomas.
- Q. Do you have that letter?
A. No. I have destroyed it.

Q. Where was the letter mailed from?

A. From Warm Springs.

Q. What time in 1940 did you receive that letter?

A. In the spring.

Q. What did he say in it?

A. He just said that he was working down there at Warm Springs at CCC camp.

Q. In 1940?

A. In 1940.

Q. Have you heard from him since that time?

A. No.

Q. Do you have any other information which leads you to believe Joe Thomas is still alive?

A. According to the record there is no record to show that he is dead.

Q. What makes you believe he is still living?

A. Just because there is no record or file—nothing to show he is dead.

Q. Did Joe use to write to you quite often?

A. Yes sir.

Q. How often would he write?

A. Two or three times a year.

Q. Did he do that every year?

A. Yes sir.

Q. Have you heard from him since 1940?

A. No.

Q. And you say he used to write two— three times a year?

A. Yes sir.

Q. Sam, who was your father?

A. Well my father was Tommy Types.

Q. Was he an Indian of this reservation?

A. No. From Nez Perce.

Q. Was he married to your mother?

A. I couldn't say. I think she was.

Q. Do you know whether they lived together as man and wife?

A. I have heard people say that they lived together.

Q. No other sisters and brothers living?

A. No.

Q. (By Attorney Perry:) You were born before John Thomas and your mother were married?

A. Yes. I was born before my sister.

(SAM LUTON: That letter I mentioned was from Portland.

Certified, a correct transcript of my notes of testimony of Samuel J. Luton given under oath before me at Umatilla Agency, Pendleton, Ore., Dec. 10, 1947.

/s/ D. H. BRUCE
Examiner of Inheritance.

EXHIBIT A-14

Filed August 12, 1958 Harry M. Hull, Clerk
Estate of John Thomas, Umatilla No. C-223, deceased.
Joe Hayes, being first duly sworn, testifies as follows:

I do solemnly swear that the testimony I am about to give in the matter now pending, entitled the matter of the estate of the decedent, shown above will be the truth, the whole truth and nothing but the truth, so help me God.

/s/ JOE HAYES

Subscribed and sworn to before me this 29th day of April, 1953.

/s/ R. J. MONTGOMERY
Examiner of Inheritance.

Q. State your name, age, and residence.

A. Joe Hayes, born August 2, 1889, Route 1, Box 181, Pendleton, Oregon.

Q. To what tribe do you belong?

A. Nez Perce and Umatilla.

Q. Did you know John Thomas?

A. Yes, we were first cousins.

Q. Was it through your mother or your father?

A. My mother.

Q. Who was your mother?

A. Louise. She died in 1925.

Q. How was Louise related?

A. She was related to John's mother, who died in 1915.

Q. What relation was Louise to John's mother?

A. Full sister, same father and same mother.

Q. Did Louise have any other brothers or sisters?

A. No, there was just the two of them.

Q. Who was John's father?

A. Senator Mitchell, he died in 1910.

Q. Did John's father have any brothers or sisters?

A. No.

Q. What children did your mother have?

A. She had three, there is just me living, the other two died when I was small.

Q. Who was your father?

A. Joe Kalytin, he died when I was small.

Q. Did you ever see him?

A. I saw him but I don't remember him. It was over 50 years ago when he died.

Q. Were your father and mother married?

A. Yes.

Q. John had a son, Joseph, did you know about him?

A. Yes.

Q. You testified in the case of John Thomas before former Examiners Bruce and Coursey, did you not?

A. Yes, I did.

Q. Do you have anything to add to your testimony other than that which you told them?

A. No. I don't know anything more about it.

Q. Is there anything else you want to say now?

A. No. Only what I said before. There is nothing new that I know about.

I certify that this transcript is a correct and true recital of testimony as given by this witness, Joe Hayes.

/s/ B. M. OJIBWAY
Law Clerk.

EXHIBIT A-16

Filed August 12, 1958 Harry M. Hull, Clerk
Estate of JOHN THOMAS, dec. Umatilla No. C-223.

I do solemnly swear that the testimony I am about to give in connection with the matter of the estate of the decedent named above, will be the truth, the whole truth and nothing but the truth, so help me God.

/s/ JOE HAYES

Subscribed and sworn to before me at Umatilla Indian Agency, Pendleton, Ore., December 10, 1947.

/s/ D. H. BRUCE
Examiner of Inheritance

- Q. State your name, age, tribe, and place of residence.
A. JOE HAYES. 58. Nez Perce and Umatilla. Pendleton, Route 1.
- Q. How long did you know Joe Thomas?
A. Ever since he was born.
- Q. When did you last see Joe Thomas alive?
A. About 1938.
- Q. Where was he at that time?
A. At Lapwai, Idaho.
- Q. Will you tell us about his alleged disappearance, and what you have done to try to find out where he is or what has happened to him?
A. That's a question—no one knows what has happened to him. He was working in a C C C camp in 1939 at Warm Springs. Him and Tony Vincent went to Portland on the 2nd and 3rd of August, 1939. (EX-

AMINERS NOTE: THE TONY VINCENT REFERRED TO BY THIS WITNESS HAS SUBSEQUENTLY BEEN IDENTIFIED AS TONY BENSON, OF ROUTE 1, WHITE SWAN, WASHINGTON) He disappeared on the 3rd. I have looked high and low for him.

Q. Did you go to Portland to look for him?

A. Yes. I went down there to look for him. There was a body found in the river and I looked at the body but couldn't tell who it was or whether it was an Indian or a white man. Henry Galloway, the officer from the Agency was along and he looked at the body too.

Q. Did you get any information at all about Joe Thomas when you went to Portland?

A. No, I didn't get no information.

(ATTORNEY PERRY:)

Q. Joe, did you get the information that Joe Thomas and this *Vincent* were in a hotel room and that Joe went out to get some whiskey?

A. Well, I tell you how I got it. Tony is a personal friend of mine and he was also a good friend of Joe Thomas, and they travelled together and like I say, they left Warm Springs on the 2nd, of August, and went to Portland. They got a room there. I don't know just where. Tony stayed at the room and took a bath and Joe went down the street for whiskey or something. Tony waited for hours and hours and Joe never showed up. He got ready and went down town and looked for him and asked several boys if they saw Joe, and nobody seem to know where he was and nobody seen him, and he went to Police Department to inquire for Joe and he didn't get any information.

Q. How do you know those things?

A. Tony told me about that.

Q. When did you talk to Tony about it?

A. It was after Joe got lost. I asked Tony several times. Tony used to get letters from Joe and Tony said he never got letters from Joe from anyplace any more. Never got no letter or nothing.

Q. Did Joe get pretty quarrelsome when he was drinking?

A. He was in a way. He was pretty rought when he got drunk. That's the reason he got cut up in Lapwai one time.

Q. Did Joe Thomas have a wife in his lifetime?

A. He had a wife.

Q. What was her name?

A. I don't remember.

Q. What tribe was she from?

A. Nez Perce.

Q. Were they married according to law or Indian custom?

A. Indian custom.

Q. How long did they live together?

A. About three years off and on. They both get drunk and lose each other once in a while and find each other again maybe in a week or ten days. She was Katherine McConnville.

Q. Were Joe Thomas and Katherine regarded as man and wife at the time of his disappearance?

A. No, she got killed before Joe disappeared.

Q. Did he have any woman as his wife at the time he disappeared?

A. No.

Q. Did Joe Thomas have any children?

A. No sir.

Q. His mother and his father both dead?

A. Yes sir. His father died after his disappearance. His mother died long before that.

Q. Did Joe have any brothers or sisters?

A. He had a brother and sister. The sister died. Sam Luton is the brother—half bro.

Q. Did Sam Luton have the same mother or the same father with Joe Thomas?

A. Same mother.

Q. What was the name of Sam Luton's father?

A. I don't know. I don't think there is a man on the reservation who knows.

Q. What was the name of Joe's sister?

A. Annie Thomas.

Q. Did she die before Joe Thomas disappeared?

A. Yes. In March, 1922.

Q. Did Annie have children?

A. No, she wasn't married.

Q. Anything else you wish to say about this case at this time?

A. Well, I don't think there is.

* * * *

Certified, a correct transcript of my notes of testimony given under oath before me by Joe Hayes, at the Umatilla Indian Agency, December 10, 1947.

/s/ D. H. BRUCE
Examiner of Inheritance.

62 A

Exhibit A-17

Filed August 12, 1958 Harry M. Hull, Clerk

IN REPLY REFER TO

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
WASHINGTON 25, D. C.

Probate
12282-54
7324-54
16056-52
46742-41

OCT 22 1954

Mr. R. J. Montgomery
Examiner of Inheritance
P.O. Box 3537
Portland 8, Oregon

Dear Mr. Montgomery:

In accordance with the amendment of section 81.20, Presumption of Death, Title 25, Code of Federal Regulations, published in the Federal Register of October 20, 1954 (19 F.R. 6731), there are enclosed the files of this office with respect to the estates of Joseph and John Thomas, Umatilla Indians, and William J. Moore, unallotted Roseburg Indian, for action by you. Please return the files to this office when they have served their purpose.

Sincerely yours,

/s/ E. J. Utz
Commissioner

Enclosure

Registered Mail
Return Receipt Requested

file w/16056-52-350

Filed September 17, 1958 Harry M. Hull, Clerk
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 859-58

JOE HAYES, Plaintiff,

v.

FRED A. SEATON,
SECRETARY OF THE INTERIOR,
Defendant.

ORDER DENYING PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT AND GRANTING THE
DEFENDANT'S MOTION FOR JUDGMENT ON THE
PLEADINGS OR FOR SUMMARY JUDGMENT

This matter coming on for hearing in Washington, D. C., on the 15th day of September, 1958, on Defendant's Motion for Judgment on the Pleadings or for Summary Judgment and Plaintiff's Motion for Summary Judgment, and the Court having heard argument of counsel, it is by this Court on this 17th day of September 1958.

ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion for Summary Judgment be and it is hereby denied, that the Defendant's Motion for Judgment on the Pleadings or for Summary Judgment be and it is hereby granted and the complaint is dismissed.

/s/ EDWARD M. CURRAN
JUDGE

No objection as to form.

Leon BenEzra
Attorney for Plaintiff

Filed October 17, 1958 Harry M. Hull, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 859-58

JOE HAYES, Plaintiff

v.

FRED A. SEATON,
SECRETARY OF THE INTERIOR,
Defendant

NOTICE OF APPEAL

Notice is hereby given this 17th day of October, 1958 that Joe Hayes, the plaintiff above named, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the order of this court entered in this action on September 17, 1958, denying plaintiff's motion for summary judgment, granting defendant's motion for summary judgment and dismissing plaintiff's complaint.

/s/ LEON BENEZRA
Leon BenEzra
Attorney for plaintiff
810 18th Street, N.W.
Washington, D.C.

65 A

The Clerk will please notify:

Floyd L. France, Esq.
Department of Justice
Washington 25, D.C.
Attorney for defendant

/s/ LEON BENEZRA
Leon BenEzra
Attorney for plaintiff

PETITION FOR REHEARING IN BANC

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED JUL 24 1959

Joseph W. Stewart
CLERK

No. 14,813

JOE HAYES,

Appellant

v.

FRED A. SEATON,
Secretary Of The Interior,

Appellee

Leon BenEzra

810 18th Street, N. W.
Washington, D. C.

Attorney for Appellant

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 14,813

JOE HAYES,

Appellant

v.

FRED A. SEATON,
Secretary Of The Interior,

Appellee

PETITION FOR REHEARING IN BANC

Appellant, Joe Hayes, respectfully petitions the Court, pursuant to Rule 26 of the Rules of this Court, for a rehearing in the above-entitled cause by the entire Court sitting in banc.

A rehearing of this case by the entire bench of the Court is merited for the following reasons:

(1) The majority opinion in the case raises fundamental questions concerning the authority of the Judiciary to review an administrative determination and is clearly in fundamental conflict with a previous decision of this Court in Homovich v. Chapman, 89 U.S. App. D.C. 150, 191 F.2d 761.

(2) On the record in the case, the appellee's determination is erroneous, arbitrary and unreasonable and should be reversed.

At the outset, appellant wishes to state that he is wholly in accord with the vigorous and comprehensive dissent of Judge Burger in this case. Appellant can offer no more eloquent justification for granting the desired rehearing in banc than the text of the dissent of Judge Burger.

For the purposes of this petition, a brief factual statement is required to place the case in proper perspective.

On September 22, 1940, John Thomas, an Indian residing in Oregon, died, leaving a will in which he devised substantially all his property to his son, Joseph Thomas. But the devisee, Joseph Thomas, had disappeared on August 3, 1939, thirteen months prior to the death of the testator.

As a result, the Examiner of Inheritance was called upon to probate two separate and distinct estates. The first estate is that of Joseph Thomas, an Indian, who was presumed to have died intestate. The second estate is that of John Thomas, an Indian, who died leaving a will.

The question of who was entitled to the Estate of Joseph Thomas and the Estate of John Thomas turned on the factual issue of whether Joseph Thomas survived his father.

On June 20, 1956, the Examiner of Inheritance entered an order in the Estate of Joseph Thomas stating:

"Joseph Thomas (the son) is hereby presumed to have died intestate, and the date of his death is determined to have been on August 3, 1946."

On the same date, the Examiner of Inheritance entered an order in the Estate of John Thomas stating:

"A decree has been issued this date in the estate of Joseph Thomas, presuming him to have died on August 3, 1946, at the age of 35 years, which was 7 years from the time of his disappearance.

The reasons for this are fully set forth in the Order in that case." (Emphasis supplied)

The Examiner thereupon ordered the distribution of the Estate of Joseph Thomas and the Estate of John Thomas to Emma Luton, widow of the deceased Sam Luton, who was the maternal half brother of Joseph Thomas. The Examiner's decisions were appealed to the Secretary of the Interior by the appellant, Joe Hayes, who is the first cousin and heir-at-law of John Thomas. The Examiner's orders were affirmed by the Secretary of the Interior.

Appellant contends that under Oregon Law¹ and the prevailing law in the United States² the Examiner erred in presuming the date of Joseph Thomas's death. Appellant further contends that since Emma Luton's right to inherit the estate of John Thomas is derived through Joseph Thomas, she must prove by affirmative evidence that Joseph Thomas survived his father. Otherwise, the devise by John Thomas to Joseph Thomas lapsed.³ Appellant contends, moreover, that since Emma Luton failed to establish by evidence that the devisee Joseph Thomas survived the testator, the devise lapsed and the Estate of John Thomas was inherited by appellant Joe Hayes under Oregon law.

THE DETERMINATION OF THE SECRETARY OF
THE INTERIOR IN THE ESTATE OF JOHN THOMAS
IS REVIEWABLE BY THE COURTS.

Appellant contends that the determination of the Secretary of the Interior in the Estate of John Thomas is reviewable by the courts. The Estate of Joseph Thomas, who died intestate, was probated under Section 1 of the Act of June 25, 1910, 36 Stat. 855, 25 U.S.C. sec. 372,

¹ Hefford v. Metropolitan Life Ins. Co., 173 Ore. 353, 144 P. 2d 695 (1944)

² Jones v. Metropolitan Life Ins. Co., 73 App. D. C. 92, 93, 116 F. 2d 255 (1940); Davie v. Briggs, 97 U.S. 628 (1878).

³ In Re Phene's Trusts, Law Rep. 5 Ch. 139; In Re Lewes's Trusts, Law Rep. 11 Eq. 326; 1 Taylor Evidence (11th Ed., 1920) sec. 200; 1 Greenleaf Evidence (13th ed. 1876) sec. 41, footnote 2 at pp. 50, 51. These cases and textbooks on evidence were cited as authoritative by the Supreme Court in Davie v. Briggs, supra.

which authorizes the Secretary of the Interior to probate the estates of Indians who die intestate. The Estate of John Thomas who left a will was probated under Section 2 of that Act which authorizes the Secretary to probate the estates of Indians who die leaving a will. Only Section 1 of the act provides that the determination of the Secretary of the Interior shall be final and conclusive.¹

Appellee contends that in reaching his determination in the Estate of the testator John Thomas, the examiner adopted and applied the finding made by him in the Estate of Joseph Thomas. The majority opinion adopted the contention of appellee that this action of the Examiner had the effect of foreclosing judicial review.

As Judge Burger cogently states on page 5 of his dissent, the fact that the Examiner's finding in the son's Section 1 estate

" . . . was arbitrarily borrowed by the Examiner when he made his determination as to the Section 2 estate has no bearing on whether the court can or cannot review that determination. If the statute permits any judicial review of a Section 2 determination, as we held it did in *Homovich v. Chapman* . . . , that review is not foreclosed by the fact that the particular finding which a party attacks was adopted from another and perhaps unreviewable proceeding."

If, as appellee alleges, the Examiner did in fact apply the finding in the Joseph Thomas case to the John Thomas case, is there not some question as to whether due process has been followed in reaching a determination in the John Thomas case? For we must take into account the fact that (as the Joint Appendix filed with appellant's brief shows) extensive hearings, testimony and evidence was assembled as part of the record in the John Thomas case. Are we to understand that the

¹ In "Federal Indian Law" published by appellee in 1958, the appellee himself states at page 78, that a Section 1 determination of the Secretary may be reviewed by the Judiciary upon a showing of fraud, error of law, or gross mistake of fact.

finding of the Examiner in the John Thomas case was made without any consideration of the hearings, testimony and evidence assembled in the John Thomas record? Appellant respectfully submits that the appellee can not have his cake and eat it too. If appellee is correct that the Examiner applied the finding in the Joseph Thomas case to the John Thomas case, then it is apparent that the same Examiner arbitrarily ignored the extensive hearings, testimony and evidence in the John Thomas case, which should have been the basis for his determination. The Examiner's determination in the John Thomas case, therefore, is fatally defective because it ignored the evidence in the case.

In Homovich v. Chapman, 89 U.S. App. D.C. 150, 191 F.2d 761, 764 (1951), this Court held that a Section 2 determination of the Secretary of the Interior was subject to judicial review. This view was forcefully expressed by Judge Prettyman as follows:

"The Secretary maintains that his action in respect to the wills of Indians is not reviewable by the courts. But the actions of Secretaries in respect to these wills have been reviewed by the courts, and no case to the contrary is cited to us. The Secretary argues that, because Section 1 of the 1910 Act, dealing with the determination of the heirs of an Indian who dies without a will provides that his determination 'shall be final and conclusive', therefore, Section 2 of that Act, dealing with wills, must be read as though it contained a similar provision, although in fact it does not. We think it plain that, if Congress had meant that the decisions in Section 2 should be final and conclusive, it would have said so; in the immediately preceding paragraph it had so provided when it meant to do so."

The majority opinion in this case is at odds with the opinion of this Court in the Homovich case.

Appellant, as the heir at law of John Thomas has a property right protected under the Constitution. That property right, even if it is only a claim, may not be taken from him without due process. By

holding that the Secretary's determination is unreviewable, even if it is erroneous, the majority opinion has, in effect, deprived appellant of the right of judicial review which is guaranteed him under the due process clause of the Constitution. The soundness and validity of Judge Burger's observation at page 7 of his dissent regarding the Court's jurisdiction can hardly be questioned —

"Absent a clear legislative expression making unreviewable an administrative action of this character, courts should be reluctant to find lack of jurisdiction. See Monongahela Bridge Co. v. United States, 216 U.S. 177, 195 (1910); The King v. Plowright, 3 Mod. 94, 87 Eng. Rep. 60 (K.B. 1686); 4 Davis, Administrative Law Treatise ch. 28 (1958)."

ON THE RECORD OF THIS CASE THE ADMINISTRATIVE DETERMINATION OF THE SECRETARY OF THE INTERIOR WAS ERRONEOUS, ARBITRARY, AND UNREASONABLE AND SHOULD BE REVERSED.

Appellant believes that the inconsistent positions asserted by appellee in the District Court and in this Court regarding the governing facts and the applicability of Oregon law will demonstrate beyond doubt that the administrative determinations at issue were erroneous, arbitrary, and unreasonable, and should be reversed.

It must be kept in mind that the determination of the legal heirs to the Estate of Joseph Thomas and the Estate of John Thomas turns on the single question of whether Joseph Thomas, the son, survived his father, John.

In the District Court and in this Court, the appellee made inconsistent statements regarding the factual and legal basis for his determination that Joseph survived his father, John. The positions taken by appellee in the District Court and in this Court are summarized below in paraphrase:

APPELLEE'S POSITION IN
DISTRICT COURT

1. There is no evidence sufficient to show whether Joseph Thomas did or did not survive John Thomas, his father.
2. The Secretary found that there was no evidence sufficient to sustain a finding of fact, and, consequently, made a presumption following the law of the State of Oregon.
3. Appellee applied Oregon law and admonished the District Court that if it assumed jurisdiction to review, it must follow Oregon law.

APPELLEE'S POSITION IN
THIS COURT

1. The finding by the Examiner of Inheritance that the son was living at the time of his father's death is a reasonable inference of fact and is supported by the evidence.
2. Nowhere in that determination does the Examiner make use of a presumption of law to show the continuance of life of the son past the date of the father's death.
3. Appellee is not bound to follow Oregon law.

In commenting on the correctness of the decision of the District Court, Judge Burger states in his dissent, on page 8:

"It is not clear from the record whether the Examiner of Inheritance presumed the son, Joseph Hayes, to have died exactly seven years after the date of his disappearance or whether he made this finding by weighing all the evidence. More likely he did the former, but whichever he did, his action seems clearly erroneous to me. In other words, if he made a presumption of law, he did so upon an improper interpretation of applicable law. If he made a factual determination, it is not supported by substantial evidence on the record as a whole."

Responsibility for the absence of clarity on the question of whether the Examiner's determination that Joseph Thomas survived his father John was based on a presumption of law or on the evidence, can be laid squarely at the doorstep of appellee. It is directly attributable to inconsistent positions taken by appellee in this Court and in the District Court on this question.

Thus, in this Court, the appellee (in the quotation immediately below) states flatly that the Examiner's determination that Joseph

survived his father John was based on the evidence and not on a presumption of law.¹

" . . . the finding by the Examiner of Inheritance that the son was living at the time of his father's death is a reasonable inference of fact and is supported by the evidence."¹

"Nowhere in that determination does the Examiner make use of the presumption of law to show the continuance of life of the son past the date of the father's death. On the contrary, as clearly set forth, supra, the correctness of the Examiner's decision can be shown by sole reliance upon an inference of fact and without the use of the presumption of law."²

In direct contrast with the foregoing (as shown in quotations of appellee immediately below) the appellee expressly stated in the District Court that the Examiner's determination that Joseph Thomas survived John Thomas was based on a presumption of law and not on the evidence.

1. "The Secretary of the Interior, or his delegated representative, found that there was no evidence sufficient to sustain a finding of fact, and, consequently, made a presumption following the law of the State of Oregon."³
2. "Therefore, the situation is that Joseph Thomas disappeared in 1939, but that there is no evidence sufficient to show whether Joseph Thomas did or did not survive John Thomas, his father."⁴

But the disparity between the statements made by appellee in this Court and those made by appellee in the District Court is even more

¹ Appellee's brief in this Court at page 8.

² Ibid at pages 13 and 14.

³ Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Summary Judgment at page 9 — filed by appellee in the District Court on August 19, 1958.

⁴ Memorandum of Points and Authorities in Support of Defendant's Motion for Judgment on the Pleadings or for Summary Judgment, at page 11 — filed by appellee in the District Court on June 30, 1958.

striking in regard to the question of whether the law of the State of Oregon governs these cases. In this connection, the appellee represented to this court that the Secretary of the Interior is not bound to follow Oregon law when he stated:

" . . . the Secretary is not bound to follow state law in these matters other than the laws of descent and distribution. ¹

" . . . The Oregon law on presumptions cannot be included in the category of laws normally intended by the terms 'descent and distribution.' ²

But the appellee failed to disclose to this Court that the Secretary did, in fact, expressly apply Oregon law in reaching his determinations, and even went so far as to admonish the District Court that if it assumed jurisdiction it must follow the decisions of the Supreme Court of Oregon. A reading of the quotations below will convince the Court of the validity of the above statement by appellant.

STATEMENTS OF APPELLEE IN COURT BELOW
THAT OREGON LAW APPLIES AND HAS BEEN
APPLIED BY THE SECRETARY

1. "Consequently, the presumption based upon Oregon law (as distinguished from a finding of fact based upon evidence) made by the Secretary is correct and must stand." ³
2. "The Secretary of the Interior, or his delegated representative found that there was no evidence sufficient to sustain a finding of fact as to the date of death of Joseph Thomas, and, consequently made a presumption following the law of the State of Oregon." ⁴

¹ Appellee's brief to this Court at page 14.

² Ibid at page 15.

³ Memorandum of Points and Authorities in Support of Defendant's Motion for Judgment on the Pleadings and for Summary Judgment, at p. 12 — filed by appellee in the District Court on June 30, 1958.

⁴ Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Summary Judgment, at p. 9.

3. "Under Oregon law, there are two presumptions which are applicable and which the Secretary of the Interior applied. . . . The law of Oregon provides a second presumption, . . . The Secretary of the Interior followed that presumption, which is established as applying to cases of this nature by the Supreme Court of the State of Oregon and determined that Joseph Thomas did not die until the end of the seven years, in other words, until after the death of his father . . .

"We respectfully submit, this Court, if it takes jurisdiction of the case, must follow the decisions of the Supreme Court of the State of Oregon in applying Oregon law and must presume that Joseph Thomas continued to live until the end of the seven-year period." (Emphasis supplied) ¹

It is apparent from the foregoing that, as to the basic facts and law governing this case, appellee has stated a position in the District Court which is irreconcilable with the position he has asserted in this Court. In this Court, the appellee has rejected the position previously taken by him in the District Court as to the governing facts and law.

With respect to the question of the applicability of Oregon law, the issue, appellant submits, is not whether the Secretary may or may not follow Oregon law. It is, rather, since the Secretary did in fact expressly follow Oregon law, and since he admonished the District Court that it must follow Oregon law, may the Secretary in this Court deny the applicability of Oregon law? It must be apparent that the equivocal and contradictory positions taken by appellee in the District Court and in this Court regarding the basic facts and the applicability of Oregon law have stripped the Secretary's determinations of the very evidentiary and legal basis upon which they were predicated. In the

¹ Hearing on Motions before Judge Curran of the United States District Court for the District of Columbia — September 15, 1958. From argument in behalf of defendant, Fred Seaton, by Floyd France, Esq., Attorney, Department of Justice — at pages 7 and 8 as reported by David Spatzer, court stenographer.

circumstances, the Secretary's determinations cannot be upheld on the grounds that they were reasonable. The reasons why the Secretary should be reversed are clearly summarized by the following quotation from the last page of Judge Burger's dissent:

"If we apply the law of Oregon, then, the presumption as to the time of death made by the Examiner of Inheritance was clearly erroneous. No reasonable interpretation of Oregon law can support the presumption because the Supreme Court of Oregon held flatly to the contrary in Hefford v. Metropolitan Life Ins. Co., supra.⁸ It follows that, if the Examiner's decision is to be read as being based on a presumption, the District Court should have set it aside even though the scope of review is limited to setting aside only those legal determinations which are unreasonable.

"Turning now to the other possible interpretation of the Examiner's orders, I do not believe that his finding has any substantial basis in the evidence. Since the majority did not decide this point, no purpose would be served by reviewing the evidence here. Suffice it to say that careful scrutiny of the entire record satisfies me that the evidence would not furnish any basis for the Examiner's conclusion.

"For the foregoing reasons I would reverse the summary judgment for the Secretary and remand the case to the District Court with directions to vacate the Secretary's order insofar as it relates to the estate of John Thomas and remand the case to the Secretary for further proceedings.

⁸The earlier case of Fink v. Prudential Ins. Co., 162 Ore. 37, 90 P. 2d 762 (1939), is not to the contrary because, under the circumstances of that case, the Court merely refused to indulge in any presumption of death. It did not reach the issue of a presumption as to the time of death."

What is most shocking in this case is that the Secretary of the Interior has shifted his position in this Court from the position taken by him in the District Court as to the basic facts and law governing this case. This shift in position has left the Secretary without either

a presumption of law or substantive facts upon which his determination may be held to be reasonable.

Appellant respectfully urges that this Court also take into account the fact that the Secretary is acting in this matter not only as a probate court but as a trustee as well. We are dealing here with an Indian who is a ward of the Government of the United States and not a litigant against the Government in the ordinary sense. To leave this Indian without a judicial remedy in these circumstances must violate our basic sense of fair play and elementary justice.

For all of the foregoing reasons, appellant respectfully urges that this petition for rehearing in banc be granted, that the majority opinion affirming the decision of the District Court be reconsidered in banc, and that the Court "reverse the summary judgment for the Secretary and remand the case to the District Court with directions to vacate the Secretary's order insofar as it relates to the estate of John Thomas and remand the case to the Secretary for further proceedings."¹

Respectfully submitted,

Leon BenEzra

810 18th Street, N.W.
Washington, D. C.

Attorney for Appellant

¹ Judge Burger's dissent at page 12.

CERTIFICATE OF COUNSEL

I, Leon BenEzra, attorney for appellant Joe Hayes, do hereby certify that the foregoing petition for rehearing in banc is presented in good faith and not for delay.

Leon BenEzra
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of July, 1959, I delivered a copy of the foregoing petition to Robert S. Griswold, Attorney, Department of Justice, Washington, D. C.

Leon BenEzra
Attorney for Appellant